Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

THE DOW CHEMICAL COMPANY,

Petitioner,

v.

AKA RAYMOND TANOH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Class Action Fairness Act of 2005 ("CAFA") for the first time permitted removal of mass civil actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(A)-(B)(i). In light of CAFA's purpose to facilitate, rather than hinder, removal of such mass actions, can removal be avoided by arbitrarily and deliberately dividing a single mass action into several, identical cases, each with less than 100 plaintiffs?

2. Does CAFA require a removing party to demonstrate that at least 100 plaintiffs will be parties to an actual trial of the removed action or is removal determined at the time of filing, regardless of how the case is eventually tried?

RULE 14.1(B) LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendant-Appellant and Petitioner: The Dow Chemical Company.

Plaintiffs-Appellees and Respondents: Aka Raymond Tanoh, Assye Eugene Tanoh, Otchoumou Jean Marie Tanoh, Tiraogo Paul Taonsa, Issiaka Jean Pierre Tapsoba, Noraogo Salfo Tarbagdo, Noaga Tarihidiga, Sanoyo Tidiane, Berte Tiecoura, Traore Tiediougou, Kone Tiegbe, Norago Michel Tiendrebego, Zani Togola, Tomindreau Philippe Toman, Ouambi Tonde, Lalle Tougouma, Abou Dramane Traore, Adama Traore, Arouna Traore, Boureima Traore, Daouda Traore, Issa Traore, Kalifa Traore, Lancine Traore, Salia Traore, Salifou Traore, Sekou Traore, Abdulai Umaru, Darius Kouassi Vangah, Say Francis Vangah, Degui Vognin, Soumalia Wango, Fifou Jean Marie Waongo, Tilado Waongo, Anibe Laurent Wogne, Ahimi Wognes, Anibe Maurice Wognin, Kouamenan Joseph Wognin, Kraidy Emile Wognin, N'taye Wognin, Paul Wognin, Paul Wognin, Christophe Yama, Yemdaogo Yamma, Alle Felix Yangra, Joseph Yangue, N'taye Cesestin Yao, Afori Yaw Ouattara Ybroyman, Koudsi Yerbanga, Bigo Yoro, Karim Yougbare, Konate Youssouf, Oued Ahmed Youssouf, Idrissa Zabre, Lamoussa Zagre, Arzoura Augustin Zangre, Bassirou Zare, Bokare Zeba, Mogtar Zeba, Pawendsagre Zembo, Moumouni Zerbo, Sekou Mahamadou Zerbo, Yacouba Zerbo, Tanh Theophile

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RULE 29.6 CORPORATE DISCLOSURE

The Dow Chemical Company has no parent company, and no publicly held company owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

The Dow Chemical Company ("Dow") respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, *Tanoh v. Dow Chemical Co.*, dated March 27, 2009, is officially reported at 561 F.3d 945, and is reproduced in the Appendix ("App.") to this Petition. *See* App. at 1–26. The unreported Remand Order of the United States District Court for the Central District of California in *Tanoh v. AMVAC Chemical Corp.* was entered in Civil Minutes dated October 21, 2008 and is reproduced in App. at 27–39.

JURISDICTION

The Court of Appeals entered an opinion on March 27, 2009. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion sought to be reviewed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332(d)(11)(B)(i) of the Class Action Fairness Act of 2005 provides in relevant part that federal removal jurisdiction applies to civil actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." The statutes involved in this case, 28 U.S.C. § 1332 and 28 U.S.C. § 1453, are reproduced at App. 40–51.

INTRODUCTION

This case presents a direct conflict between two Circuit Courts of Appeal, the Sixth and Ninth, on an issue of national importance regarding application of key provisions of the Class Action Fairness Act of 2005 ("CAFA"). CAFA was intended to "restore the intent of the framers" by extending federal court jurisdiction over "interstate cases of national importance under diversity jurisdiction." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (2005). In enacting CAFA, Congress intended to correct abuses of the class action device, including gamesmanship by plaintiffs' counsel designed to defeat removal jurisdiction.

Two cases have recently confronted a question of first impression under CAFA: whether plaintiffs may arbitrarily and deliberately divide their claims into several identical state court complaints for the sole

purpose of avoiding CAFA removal. In *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405 (6th Cir. 2008), the Sixth Circuit reversed the district court's remand, holding that where there was no "colorable argument" that the division into separate complaints was for any purpose other than avoiding CAFA removal, such division constituted the very sort of gamesmanship CAFA was intended to prevent.

In the case below, the Ninth Circuit considered the same type of arbitrary division of claims to avoid CAFA removal and came to the diametrically opposite conclusion, affirming the remand of the cases to state court. The Ninth Circuit's opinion expressly endorses the very type of deliberate procedural gamesmanship that CAFA intended to abolish. It provided a roadmap to avoid CAFA mass action removal, simply by filing multiple, identical lawsuits with less than 100 plaintiffs each. Although the Ninth Circuit attempted to distinguish the *Freeman* opinion on the ground that it concerned removal of a *class* action, whereas this action involves removal of a *mass* action, that is a distinction without a difference. The issue in both cases was whether CAFA permits plaintiffs to manipulate complaints to avoid removal: the Sixth Circuit answered "no" and the Ninth Circuit answered "yes."

In addition, the opinion below held that no mass action may be removed under CAFA unless the trial would encompass claims of 100 or more plaintiffs. That is an unnecessary and impractical interpretation of CAFA that would render meaningless the right to remove mass actions in virtually all cases.

These erroneous interpretations of CAFA frustrate Congress' intention to broaden the ability of defendants to remove significant mass actions for uniform resolution in federal court. The Ninth Circuit's opinion would render the mass action provisions of CAFA meaningless. That was not the intent of Congress. This Court should intervene to address this circuit conflict and to eliminate the ability of plaintiffs to avoid the intent of the mass action removal jurisdiction provided by CAFA.

STATEMENT OF THE CASE

The plaintiffs in this case are 664 West African foreign nationals who allege that they were exposed to a Dow product containing 1,2-dibromo-3-chloropropane ("DBCP") while working on banana and pineapple plantations in the villages of Ono and Kakoukro in the Ivory Coast. The plaintiffs claim to have suffered various injuries as a result of the exposure to DBCP, including sterility and infertility. The 664 plaintiffs, all represented by the same attorneys, filed seven separate actions in Los Angeles Superior Court on September 27, 2006, each of which included fewer than 100 plaintiffs. The complaints were identical save for the names of the plaintiffs. The 664 plaintiffs were divided among the seven cases alphabetically.

On the same day that the 664 plaintiffs filed their seven state court actions, the same plaintiffs,

represented by the same attorneys, also filed a single action in United States District Court (C.D. Cal) alleging violations of the Alien Tort Claims Act, 28 U.S.C. § 1350, arising out of the same operative facts as those alleged in the state actions. In doing so, they invoked federal jurisdiction under the "mass action" provisions of the Class Action Fairness Act.[1]

Dow removed the seven state court actions alleging, *inter alia*, that the United States District Court had jurisdiction under the "mass action" provisions of the CAFA. Dow argued that the same attorney could not deliberately avoid mass action removal jurisdiction "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact" by arbitrarily dividing a single mass action claim into several complaints, each with fewer than 100 plaintiffs.

On October 21, 2008, the District Court remanded these cases, holding that no CAFA jurisdiction existed. App. at 39. The District Court stated, "Defendants cite no authority holding that plaintiffs may not endeavor to work within the confines of CAFA to keep their state law claims in state court and the Court declines to do so." App. at 38. The

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[1] The Ninth Circuit affirmed the district court's dismissal of the plaintiffs' federal Alien Tort Claims Act lawsuit in an opinion dated September 24, 2008, *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733 (9th Cir. 2008).

District Court further stated that "allowing removal in this case would effect an end-run around the limits Congress itself has imposed on removal pursuant to CAFA." App. at 38.

On October 30, 2008, Dow filed a petition for permission to appeal under CAFA's discretionary review of remand orders, 28 U.S.C. § 1453(c)(1). The Ninth Circuit granted Dow's petition for permission to appeal on January 29, 2009, heard argument on this expedited appeal on March 10, 2009, and issued its opinion on March 27, 2009.

In its opinion, the Ninth Circuit affirmed the District Court's remand of plaintiffs' seven identical state court actions stating that even in these circumstances, "Congress intended to allow suits filed on behalf of fewer than one hundred plaintiffs to remain in state court." App. at 19. The Ninth Circuit attempted to distinguish the other circuit authority relied on by Dow (*Freeman v. Blue Ridge Paper Prods., Inc.*, 551 F.3d 405, 406 (6th Cir. 2008)), stating that it was inapplicable because there were other "concerns" present, and noting that the *Freeman* case "involved class actions rather than mass actions." App. at 23.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for three reasons.

First, the opinion below conflicts with the Sixth Circuit in *Freeman*, which held that the arbitrary division of a single class action into separate state court suits solely for the purpose of avoiding CAFA removal jurisdiction should be disregarded and the separate cases should be viewed as a single action for purposes of CAFA removal.

Second, the opinion below, which permits evasion of the CAFA mass action removal by the simple expedient of dividing a single mass action arbitrarily into several cases each with less than 100 plaintiffs, violates the clear Congressional purposes in enacting CAFA to facilitate removal of mass actions and to prevent the use of gamesmanship to defeat removal.

Third, the opinion below erroneously interprets CAFA mass action removal to require actual trial together of the claims of 100 or more plaintiffs, which is an impossible standard to meet at the removal stage.

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER PLAINTIFFS MAY ARTIFICIALLY STRUCTURE THEIR SUIT FOR THE SOLE PURPOSE OF AVOIDING CAFA FEDERAL COURT JURISDICTION.

A. There Is An Irreconcilable Conflict Between The Sixth And Ninth Circuits As To Whether Plaintiffs May Arbitrarily Split Their Claims Into Separate State Court Complaints For The Sole Purpose Of Avoiding Removal Under CAFA.

CAFA was enacted in 2005 in large part to "restore the intent of the framers" by extending federal court jurisdiction over "interstate cases of national importance under diversity jurisdiction." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (2005). CAFA loosened the rules governing removals of class actions and mass actions, to facilitate the uniform resolution of major multi-party disputes in federal court.[2] This expansion of federal diversity

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[2] CAFA governs two different types of claims – large class actions asserting $5 million or more in damages and mass actions brought by 100 or more plaintiffs. 28 U.S.C. § 1332(d)(11)(A). Both class actions and mass actions seek to adjudicate claims of a large number of individuals who were all allegedly harmed in the same manner. The difference is that in a class action named plaintiff(s) represent the interests of others while in a mass action all of those affected are named plaintiffs. Under CAFA, mass actions are deemed to be class actions for removal purposes. 28 U.S.C. § 1332(d)(11)(A). The term "mass action" is

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jurisdiction is incredibly rare, as CAFA marks the first time that Congress acted to *expand* diversity jurisdiction since it enacted the First Judiciary Act of 1789. In short, CAFA "work[ed] a sea change in diversity jurisdiction." *Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1193 (11th Cir. 2007).

Although CAFA was intended to increase the ability of defendants to remove large interstate class and mass actions into federal court for resolution, plaintiffs have increasingly been manipulating their claims in order to avoid CAFA removal. Two of these cases have made their way to circuit courts, which have reached diametrically opposite views of whether CAFA permits such manipulation of claims.

Freeman v. Blue Ridge Paper Products, Inc., 551 F.3d 405 (6th Cir. 2008), involved a class action for water pollution from a paper mill brought on behalf of approximately 300 landowners. *Id.* at 406. "Plaintiffs divided their suit into five separate suits covering distinct six-month time periods, with plaintiffs' limiting the total damages for each suit to less than CAFA's $5 million threshold." *Id.* (citing 28 U.S.C. § 1332(d)(2)). Viewing the five complaints as separate claims, each of which fell below the CAFA jurisdiction threshold, the district court remanded them to state court. On appeal, the Sixth Circuit reversed.

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defined as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i).

> The $5 million CAFA threshold appears to be met in this case because the $4.9 million sought in each of the five suits must be aggregated. The complaints are identical in all respects except for the artificially broken up time periods. Plaintiffs put forth no colorable reason for breaking up the lawsuits in this fashion, other than to avoid federal jurisdiction .... *If such pure structuring permits class plaintiffs to avoid CAFA, then Congress's obvious purpose in passing the statute – to allow defendants to defend large interstate class actions in federal court – can be avoided almost at will, as long as state law permits suits to be broken up on some basis.*

Id. at 407 (emphasis added).

The action below considered essentially the same issue of "structuring" of complaints by the plaintiffs' attorney in order to avoid CAFA removal jurisdiction. However, instead of dividing their actions to avoid the $5 million CAFA threshold, the attorneys in this case divided their nearly 700 plaintiffs into seven different complaints with less than 100 plaintiffs in each, in order to evade the mass action requirement of 100 plaintiffs per case. Each of the seven actions makes the same allegations verbatim – other than the names of the plaintiffs. As in *Freeman*, there is no "colorable reason for breaking up the lawsuits in this fashion, other than to avoid federal jurisdiction." The Ninth Circuit acknowledged that "CAFA was designed primarily to curb perceived abuses of the

class action device which, in the view of CAFA's proponents, had often been used to litigate multi-state or even national class actions in state courts." 561 F.3d at 952. Nevertheless, relying on the "well-established rule that plaintiffs, as masters of their complaint, may choose their forum by selecting state over federal court and . . . the equally well-established presumption against federal removal jurisdiction" (*Id.* at 953), the Ninth Circuit affirmed the remand of these seven cases.

The Ninth Circuit distinguished *Freeman* because it involved "class actions rather than mass actions." 561 F.3d at 955. The Court also relied on the CAFA provision defining the term mass action as not including "any civil action in which . . . the claims are joined upon motion of a defendant" (28 U.S.C. § 1332(d)(11)(B)(ii)(II)) to suggest that Congress had specifically rejected the notion that separate state court complaints could be considered to be a single mass action for removal. *Id.* at 953. However, these distinctions are ephemeral. Plaintiffs' manipulation of their complaint in this case is no different from the gamesmanship rejected in *Freeman*. "CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction." *Freeman*, 551 F.3d at 47.[3] For these reasons, the two opinions are simply irreconcilable.

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[3] *See also Proffitt v. Abbott Labs.*, No. 2:08-cv-151, 2008 WL 4401367, at *5 (E.D. Tenn. Sept. 23, 2008) (cited with approval

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B. CAFA's Text And Legislative History Demonstrate That Its Purpose Was To Liberalize Removal Of Interstate Class And Mass Actions And To Prevent Plaintiffs From Manipulating Their State Court Complaints To Avoid Removal.

As noted above, courts have uniformly recognized that CAFA's removal provisions were designed to facilitate removal of large, interstate class and mass actions to federal court and to prevent plaintiffs from manipulating their claims to avoid federal removal. For example, CAFA removes the strict diversity requirement, which permitted the addition of a single plaintiff with the same state of citizenship as any defendant to prevent removal. 28 U.S.C. § 1332(d)(2). CAFA added a requirement for class action removal that the aggregated amount in controversy must exceed $5 million (*id.*), to ensure that removals under this provision would be limited to major disputes. It also added an entirely new provision for mass action removal (28 U.S.C. § 1332(d)(11)), to prevent plaintiffs

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by *Freeman*) (denying a remand motion in eleven lawsuits that were also identical except that they were divided by one-year time periods in order to allow a similar damages disclaimer of $4.9 million); *Brook v. UnitedHealth Group, Inc.*, No. 06-cv-12954, 2007 WL 2827808 (S.D.N.Y. Sept. 27, 2007) (cited with approval by *Proffitt*) (The court denied plaintiffs' motion to remand and held "[p]laintiffs cannot simply evade federal jurisdiction by defining the putative class on a state-by-state basis, and then proceed to file virtually identical class action complaints in various state courts. Such conduct is precisely what the CAFA legislation was intended to eradicate.").

from avoiding removal through the expedient of naming numerous individual plaintiffs, rather than filing a representative class action.

All of these provisions of CAFA were designed to (a) facilitate the removal of large, interstate and international class and mass actions from state to federal court and (b) to prevent plaintiffs from frustrating such removal by gaming the system. CAFA's "obvious purpose" was to "allow defendants to defend large interstate actions in federal court." *Freeman*, 551 F.3d at 407. Courts repeatedly have recognized that this paramount purpose was to sweep into federal court "most major interstate class actions." *Amoche v. Guarantee Trust Life Ins. Co.*, 556 F.3d 41, 47 (1st Cir. 2009); *see also Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 761 (7th Cir. 2008) (CAFA "creates federal jurisdiction over . . . multistate class actions with substantial stakes."). Put simply, CAFA enabled defendants to remove high-stakes litigation clearly implicating interstate commerce. *Lowery*, 483 F.3d at 1193 (CAFA "broaden[s] federal diversity jurisdiction over class actions with interstate implications."). This statutory purpose is at the very heart of CAFA and can be gleaned from the face of the statute.

This statutory purpose applies as much to mass action removal as to class action removal. Nothing in the definition of mass action requires that all of the similar claims constituting the mass action must be brought in one state court complaint. Indeed, the CAFA definitions make clear that the controlling

issue in determining removability is not the individual *complaint*, but the *claims* constituting the mass action. In 28 U.S.C. § 1332(d)(11)(B)(ii)(II),[4] CAFA specifically contemplates that claims from separate state court complaints could be joined together (other than on motion by the defendant) and still constitute a single mass action. It follows that nothing in CAFA prevents a court from considering the identical claims which were brought in different state court complaints to be a part of a single mass action for removal purposes.

1. Its legislative history confirms that one of CAFA's goals is to prevent gamesmanship.

CAFA's legislative history is replete with examples of its intent to correct abusive practices by plaintiffs' counsel. Explaining CAFA's purposes, the Senate Report states that prior law allowed "'lawyers to game' the procedural rules and keep nationwide or multi-state class actions in state courts." S. Rep. No. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 6. CAFA was intended to make it "harder for

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[4] The Court below cites this provision to support its argument that Congress willingly permitted plaintiffs to slice up their claims into separate complaints to avoid removal. App. at 12. However, this exception was clearly added to prevent defendants from forcing together a group of tangentially-related claims to get over the 100 plaintiff mark. It was never intended to be used as a sword by plaintiffs to manipulate their complaints to avoid CAFA removal.

plaintiffs' counsel to 'game the system'" by defeating diversity jurisdiction. *Id.* at 5. In short, CAFA was intended to ensure that large, complex mass actions such as this one would be removable, without regard to the "gamesmanship" of plaintiffs and their counsel in avoiding removal.

2. Plaintiffs' gamesmanship in this case.

The Ninth Circuit ignored the fact that plaintiffs have gerrymandered their case (dividing themselves alphabetically) to avoid CAFA removal. There is nothing in the facts or legal theories asserted in the complaints that would justify filing these as separate actions. The arbitrariness of plaintiffs' divisions is especially pronounced here because plaintiffs, on the same day that they filed the seven separate lawsuits in state court, also filed a single federal lawsuit alleging jurisdiction under CAFA's "mass action" provisions. The irrefutable inference is that plaintiffs intentionally divided the state court claims into seven suits for the express purpose of avoiding CAFA removal. Nowhere in their pleadings do plaintiffs deny this obvious fact. In this circumstance, where plaintiffs do not even make a colorable argument that the division of the mass action into separate complaints was for a legitimate purpose, it is contrary to the intent of Congress to permit the plaintiffs' manipulation to frustrate CAFA removal.

While a plaintiff is ordinarily master of the complaint and may plead his complaint to avoid removal,

that principle was changed by CAFA, which has a purpose to facilitate, not frustrate, removal. Since there is no explanation for the division of these claims into seven actions other than to deliberately avoid removal, the Court should recognize the reality of these cases as a single mass action and permit removal, just as the Sixth Circuit did in *Freeman*.

C. The Issue Of Whether Plaintiffs Can Arbitrarily Divide Class And Mass Claims To Avoid CAFA Removal Jurisdiction Requires Definitive Resolution.

As noted above, the CAFA removal provisions had two purposes: to make it easier to remove major multi-plaintiff actions (either class or mass actions) to federal court and to prevent the sort of "gamesmanship" previously used by class counsel to avoid removal. The decision below seriously misunderstands and misapplies these Congressional reforms. Rather than recognizing that CAFA was intended to facilitate removal of substantial interstate class and mass actions, the court below chose to apply the pre-CAFA presumption that all doubts about removability should be resolved against removal. This is flatly inconsistent with CAFA's removal reforms. The Sixth Circuit in *Freeman* did not adopt any such pre-CAFA presumption; as pointed out by the dissent in that case, if it had, the result would have been different. 551 F.3d at 411. By contrast, the Ninth Circuit expressly relied on the anti-removability doctrine in ruling that these seven cases should not be

conglomerated for purposes of determining CAFA removal. 561 F.3d at 952.

This action is a paradigm for actions that CAFA envisions would be removable to federal court. It was brought by 664 foreign plaintiffs against six defendants hailing from several different states, and it alleges a minimum $49 million in alleged damages. Allowing counsel in this case to avoid CAFA removal by subdividing their single mass action into several smaller (but identical) complaints has already had the effect of gutting the effectiveness of the CAFA removal scheme.

Even more significantly, the published opinion below provides a roadmap on how to avoid removal to federal court under CAFA. Following this roadmap, any plaintiffs' counsel can avoid mass action removal simply by dividing their claims into separate complaints of less than 100 plaintiffs each. This has the effect of eviscerating the CAFA reforms and thwarting the Congressional goal of making it easier to remove large, interstate mass actions.

This is not a theoretical or academic concern. While this case was on appeal to the Ninth Circuit, Dow was served with no less than thirty copycat lawsuits with similar allegations as here, each identical except also divided alphabetically by plaintiffs, and each just under CAFA's 100-plaintiff numerosity requirement. Dow removed these actions, but they were also remanded on the basis that plaintiffs had successfully plead around CAFA. *See, e.g., Obregon v.*

Dole Food Co., Inc., No. 2:09-cv-00186, 2009 WL 689899, at *4 (C.D. Cal. Mar. 9, 2009). The fact that other plaintiffs are already applying the lesson of the decision below demonstrates why this issue needs to be resolved definitively at the earliest possible moment, in order to validate CAFA's purpose to facilitate removal of appropriate actions to federal court.

II. THE COURT SHOULD ALSO GRANT REVIEW TO DETERMINE WHETHER "MASS ACTION" JURISDICTION REQUIRES AN ACTUAL TRIAL OF AT LEAST 100 PLAINTIFFS AS THE NINTH CIRCUIT HELD.

Instead of merely deciding the numerosity question, the Ninth Circuit's decision also presents an overarching view that under CAFA, "mass actions" are somehow "the children of a lesser god" in the CAFA pantheon. For the first time in any published decision analyzing the "mass action" provisions, the Ninth Circuit held that "[a]lthough CAFA thus extends federal diversity jurisdiction to both class actions and certain mass actions, the latter provision is fairly narrow." App. at 16. The Ninth Circuit explained the narrow scope of the mass action provisions by reasoning that the CAFA Congress "intended to limit the numerosity component of mass actions quite severely by including only actions in which the trial itself would address the claims of at least one hundred plaintiffs." App. at 19.

A. The Ninth Circuit Incorrectly Found That A "Mass Action" Requires A Physical Trial Of At Least 100 Plaintiffs.

The Ninth Circuit's interpretation of CAFA's "mass action" definition as requiring an actual trial of 100 plaintiffs is unfounded and incorrect. *See* 28 U.S.C. § 1332(d)(11)(B)(i) (as including civil actions in which the "monetary relief claims of 100 or more persons are *proposed to be tried jointly*" (emphasis added)). First, by requiring an actual trial as a pre-condition for CAFA jurisdiction, the Ninth Circuit's rule omits the word "proposed," instead requiring actual trial, and fails to give effect to each word in the statute. *See Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect.").

Second, the clause "monetary relief claims of 100 or more persons are proposed to be tried jointly" must be read in light of CAFA's text as a whole, and also cannot lead to any absurd results. *U.S. v. Morton*, 467 U.S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole."); *see also Reno v. Nat'l Transp. Safety Bd.*, 45 F.3d 1375, 1379 (9th Cir. 1995) (stating that courts do not construe statutes in ways that "would lead to absurd results"). Requiring nothing short of an actual trial to trigger removal jurisdiction would be an absurd result.

The Ninth Circuit's determination, which would only allow CAFA removal jurisdiction to attach on the

eve of an actual trial of 100 claimants, departs from the long-standing rule that jurisdictional facts should be assessed at the time of removal, not late in litigation when the parties consider trial. CAFA did not alter the general rule that once properly removed, "the federal court's jurisdiction cannot be ousted by later events." S. Rep. No. 109-14, at 70–71. CAFA's legislative history also foresaw that the "mass action" provision might not result in an actual trial of 100:

> If a mass action satisfies the criteria set forth in the section . . . it may be removed to a federal court, which is authorized to exercise jurisdiction over the action. Under the proviso, however, it is the Committee's intent that any claims that are included in the mass action that standing alone do not satisfy the jurisdictional amount requirements of Section 1332(a) [$75,000], would be remanded to state court. Subsequent remands of individual claims not meeting the section 1332 jurisdictional amount requirement may take the action below the 100-plaintiff jurisdictional threshold or the $5 million aggregated jurisdictional amount requirement. *However, so long as the mass action met the various jurisdictional requirements at the time of removal, it is the Committee's view that those subsequent remands should not extinguish federal diversity jurisdiction over the action.*

S. Rep. No. 109-14, at 45 (2005) (emphasis added). In other words, Congress intended CAFA jurisdiction to exist even if enough plaintiffs are later remanded to

bring the total below 100 and even if no joint trial of 100 plaintiffs actually ensues.

B. The Ninth Circuit Is In Conflict With Two Other Circuits' Interpretation Of CAFA's "Mass Action" Provisions.

The other circuits to have addressed this provision have rejected the argument that the language "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly," requires all 100 plaintiffs to proceed to simultaneous trial. The Eleventh Circuit sensibly concluded that the "proposed to be tried jointly" clause is part of a larger "commonality requirement." *Lowery*, 483 F.3d at 1202–03, where the court of appeals declared:

> [W]e now have identified at least four requirements for an action to be deemed a mass action. These requirements are: (1) an amount in controversy requirement of an aggregate of $5,000,000 in claims; (2) a diversity requirement of minimal diversity; (3) a numerosity requirement that the action involve the monetary claims of 100 or more plaintiffs; and (4) *a commonality requirement that the plaintiffs' claims involve common questions of law or fact.*

Id. (emphasis added).

Similarly, the Seventh Circuit examined the phrase "proposed to be tried jointly" in *Bullard v.*

Burlington Northern Santa Fe Railway Co., 535 F.3d 759 (7th Cir. 2008), where plaintiffs argued that defendants could remove "only on the eve of trial, once a final pretrial order or equivalent document identifies the number of parties to the trial." *Id.* at 761. Rejecting plaintiffs' argument, the Seventh Circuit emphasized the word "proposed:"

> It does not matter whether a trial covering 100 or more plaintiffs actually ensues; the statutory question is whether one has been proposed. This complaint, which describes circumstances common to all plaintiffs, proposes one proceeding and thus one trial.

Id. at 762.

The *Bullard* court also recognized that "trial" can be broadly interpreted, noting that "the question is not whether 100 or more persons answer a roll call in court, but whether the 'claims' advanced by 100 or more persons are proposed to be tried jointly." *Id.* The statute could be satisfied if, for example, a trial of 10 exemplary plaintiffs was followed by issue preclusion to the remaining plaintiffs without trial. *Id.* The Ninth Circuit missed this important point, especially since under California procedure, there are a panoply of mechanisms that are deemed to be "trials." For instance, in California, a "trial" may include, among other things, "trials of issues of law." *E.g.*, *Franklin Capital Corp. v. Wilson*, 148 Cal. App. 4th 187, 197 (2007). Far from requiring an actual simultaneous trial of 100 plaintiffs, the CAFA phrase "proposed to be tried jointly," therefore, reflects the practical

concern that for any "mass action," the issues of law must be sufficiently common.

Similarly, a Florida district court denied a remand even where the removing defendants had "the premeditated intent of contending that the case should be severed and each plaintiff's case should be tried individually." *Cooper v. R.J. Reynolds Tobacco Co.*, 586 F. Supp. 2d 1312, 1318 (M.D. Fla. 2008). Using the common definition of "proposed" to mean "to form or declare a plan or intention," the court found that plaintiffs "proposed" to try their cases jointly by "filing a complaint in state court . . . and requesting one jury trial." *Id.* at 1320–22; *see also Bullard*, 535 F.3d at 762 (stating that "one complaint implicitly proposes one trial"). The court reasoned that any other construction would omit the word "proposed" from the statutory text altogether. *Cooper*, 586 F. Supp. 2d at 1320.

Contrary to the Ninth Circuit's treatment of "mass actions" as somehow a "poor cousin" under CAFA, the Seventh Circuit in *Bullard* was particularly concerned with plaintiffs' counsel finding ways to "devise close substitutes [in state court] that escape the statute's application." *Bullard*, 535 F.3d at 761. The *Bullard* court viewed the "mass action" device as just such a class action substitute:

> Plaintiffs' lawyers, who want to avoid federal court, have designed a class-action substitute. Their complaint alleges that several questions of law and fact are common to all 144 plaintiffs; it provides no more information

> about each individual plaintiff than an avowed class complaint would do. No one supposes that all 144 plaintiffs will be active, a few of them will take the lead, just as in a class action, and as a practical matter counsel will dominate, just as in a class action.

Id. In other words, the Seventh Circuit recognized that a "mass action" functions very similarly to a class action and is subject to the exact same abuses.

The CAFA Congress was aware of this point, and was just as concerned with "mass actions" as it was with class actions. The Senate Report expressly observes that "mass actions are simply class actions in disguise. They involve a lot of people who want their claims adjudicated together and they often result in the same abuses as class actions." S. Rep. No. 109-14, at 47, *reprinted in* 2005 U.S.C.C.A.N. 3, 44. The legislative history actually rebuffs the Ninth Circuit's characterization, finding that mass actions may even be "worse because the lawyers seek to join claims that have little to do with each other and confuse a jury into awarding millions of dollars to individuals who have suffered no real injury." S. Rep. No. 109-14, at 45 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 46. Finally, the statute itself defines "class actions" as including "mass actions," so the two are functionally indistinguishable under the statute. *See* 28 U.S.C. § 1332(d)(11)(A). In sum, the Ninth Circuit's analysis of CAFA's "mass action" provisions is contrary to both the statute and the legislative history.

Moreover, as the *Bullard* court recognized when it reviewed the CAFA statute as a whole, the Ninth Circuit's construction creates a tension within the statutory provisions. The problem is that, on the one hand, § 1332(d)(11)(B)(i) defines a "mass action" as any civil action "in which monetary relief claims of 100 or more persons are proposed to be *tried jointly*," and on the other hand, § 1332(d)(1)(B) defines a "class action" as a suit when it is "filed." The Ninth Circuit's rule that an actual trial must trigger "mass action" removal jurisdiction cannot be correct, because any construction that refuses to recognize a mass action until close to trial would be at odds with a "class action" occurring at the date of filing. *See Bullard*, 535 F.3d at 762.

In sum, both of these questions as decided by the Ninth Circuit effectively eliminate CAFA's "mass action" provisions if unaddressed by this Court: the first would allow a plaintiff – with no other purpose other than dodging federal court jurisdiction – to splinter a suit that otherwise would be squarely within CAFA's ambit. The second question, by requiring nothing short of an actual trial to trigger CAFA "mass action" removal jurisdiction, would effectively make these actions impossible to remove.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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561 F.3d 945

United States Court of Appeals,
Ninth Circuit.

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Yaobgoamda Zongo; Ouamnanegba Zoundi; Boureima Zongona; Saidou Zongona; Taphazoromi; Bila Issiaka Zougmore; Athanase Zougnore; Tilado Zougnore; Ganoaga Adama Zougrana; Jean Marie Zougrana; Passamwinde Zoundi,
Plaintiffs-Appellees,

v.

DOW CHEMICAL COMPANY, a Delaware corporation, Defendant-Appellant.

Akebo Abagninin; Amangoua Abli; Miessan Etienne Abli; Aba Abou; Yapo Pierre Aboua; Koffi Antoine Abri; Ampoh Adama Toure Abry; Haruna Abubakaray; Kroya Aca; Simplice Achiepo; Avenie Adja; Behira Venance Adja; Naoule Adja; Wognin Barthelemy Adja; Anouman Vanance Adje; Kouame Emile Agney; aka Francois Adjobi; Kadjo Daniel Ahicoh; Pascal Adjobi; Assmoi Lambert Adjoby; Assi Adon; Adja Bernard Adouko; Anibe Adouko; Kouassi Antonin Adouko; Michel Adoukok; Cheikh Ahmedould; Atche Ahoba; Guy Huston De Lacosta Ahoussi; Baka Joachin Ahoga; Adia Ahoulou; Kova Gregoire Ahossin; aka Pierre Ahoua; Koffi Noel Ahoua; Adje Lazare Ahoze; Vincent Aime; Abel Aka; Abli Etienne Aka; Alfred Aka; Allangba Bernard Aka; Assohoun Raymond Aka; Bognini Aka; Koua Aka; Kouassi Jerome Allangba; Niangra Joseph Aka; Amon Jean Baptiste Allouan; Ohouman Venance Aka; Wedje Denis Aka; Soumahin Joseph Akohi; Kraidi Marcelin Akredi; Kouame Alla; Aka Jaques Allangba; Anhobo Ernest Allouan; Wognin Seraphin Allouan; Ayenou Alphonse Alou; Damo Alou; Diakite Amadou; Kadjo Amon; Essi Alphonse Amangoua; Baka Amon; Kouame Ambroise

Amangoua; Vanga Jacques Amangoua; Kouassi Arsene Amani; Demele Amara; Kone Amara; Adouko Amon; Kadjo Blai Amon; Elidje Ampoh; Bangoura Amsoumany; N'Choh Assemien; Denis Angbeni; Yebi Daniel Assi; Elloh Blaise Anibe; Holy Leon Anibe; N'Taye Jacques Clotair Anibe; N'Taye Marc Anibe; aka Marius Anoh; Anoh Felix Anoh; Kraidi Etienne Anoh; Ngatta Anoh; Niamke Anoma; Aka Emmanuel Assale; Motche Assale; Bissie Bruno Assamoi; Koffi Assamoi; Anguie Jean Claude Assi; Kraiody Thomas Assemien; Dominique Assongba; Gbetondji Assouan; Otchoumou Mathias Assouhoun; Kouamelan Joseph Assouhoun; Bomoi Ateke; Abeu Julien Aye; Yapo Jean Atsain; Anon Joseph Atse; Adepo Attie; Vanga Assamoi,
Plaintiffs-Appellees,

v.

Dow Chemical Company, a Delaware corporation,
Defendant-Appellant.

Ahoulou Raphael Kangah; Kany Jacob Kany; Adama Karene Dembele Kassoum; Noraogo Kayende; Ganda Kayorgo; Issa Kayorgo; Mamadi Keita; Oumar Keita; Sibiri Keregue; Somlouguia Keregue; Nogbu Jean Kidri; Noraogo Francois Kiema; Daouda Kinda; Mahama Kindo; Ouango Koalga; Ousseni Koanda; Saidou Dit Tinkienga Koanda; Kouassi Pierre Kocogni; Abieley Kodia; Abli Jerome Koffi; Abri Firmin Koffi; Assamoi Koffi; Kacore Basile Koffi; Patrice Koffi; Yao Koffi; Nogbou Norbert Kohobo; Ayemou Francois Kokogni; Adiko Jean Marie Kokohi; Amani Etienne Konan; N'Goran Konan; Abdoulaye Konate; Bocary Konate; Diakaridia Konate; Dramane Konate; Idrissa

Konate; Issa Konate; Kah Konate; Kassim Konate; Kotigui Konate; Mamadou Konate; Moriba Konate; Moridje Konate; Souleymane Konate; Tiedian Konate; Tienakan Konate Karawa Konda; Yamangole Konda; Abdoulaye Kone; Adama Kone Anadou Kone; Diaby Kone; Dramane Kone; Inza Kone; Issa Kone; Lassina Kone; Oumar Kone; Siaka Kone; Souleymane Kone Soumaila Kone; Tiekoro Kone; Yaya Kone; Zakaria Kone; Issa Konkisre; Yetassida Konkobo; Ibrahima Konta; Basga Korsaga; Kadjo Edmond Koua; Kouassi Edmond Koua; Opokou Denis Koua; Marc Kouadio; Atsain Peter Kouadjo; Koffi Hilaire Leon Kouakou; Kouame Kouame; Kouassi Kouame; Sanga George Kouassy; Michel Kouame; Bawaya Kouda; Raymond Kouame; Ahimin Denis Kouamelan; Assemian Kouamelan; Antonin Kouassi; Ebia Paul Kouassi; Germain Ahou Kouassi; Nogbou Kouassi; Otron Severin Kouassi; Yao Djess Kouassi; aka German Koumelan; Zambende Koudougou; Adama Kouraogo; Soumane Kouraogo; Rasmane Kouraogo,
Plaintiffs-Appellees,

v.

Dow Chemical Company, a Delaware Corporation, Defendant-Appellant.

Kallilou Diarrassouba; Hado Diatin; Djakaridja Diourie; Irissa Dipama; Vonan Marcel Djaidji; Jean Djamble; Diakiro Djibougou; Camara Djibril; Edja Djiriko; N'Gatta Georges Djonwan; Lebenidiouo; Idrissa Doulkom; Amadou Doumbia; Bourlaye Doumbia; Chio Doumbia; Dable Douti; Aka Ehive; Assale Ehole; Assemien Ehoussou; Able Pierre Ekra; Moh Andre Elidje; Germain Ello; Vangah

Elloh; Adjroufou Maurice Essey Etkeri Etekri; Kouassi Ives Francois Xavier Eya; Kassouri Fane; Yao Benjamin Foto; Ousmane Ganame; Moctar Gansagne; Kouakou Ganzan; Konate Lamine Gnamy; Laya Boniface Gniminou; Adama Kone Gomon; Zila Guel; Ablasse Guiatin; Edmond Guiatin; Kouka Guiatin; Lamoussa Guiatin; Ousmane Guiatin; Yaya Guiatin; Hamidou Guire; Soumaila Guire; Tassare Guire Kpale Jules Hahoba; Seini Baba Hamadou; Bomane Hebie; Barbey Hema; Hanou Francois Hema; Mouonnoumon Hien; Winyel Hien; Ahoua Arsene Holly; N'Guessan Holly; Houa Teke Houa; Yehou Jules Houetchemou; Innocent Houndonougbo; Dassamsso Ilboudo; Pagnimdi Ilboudo; Raogo Ilboudo; Tibyande Ilboudo; Yabre Boureima Ilboudo; Koyate Issa; Traore Issa; Kpole Jean; Niangue Jean; Lancina Kabagate; Boureima Kabolom; Boudnoma Kabore; Francois Xavier Kabore; Karin Kabore; Mamadou Kabore; Ousmane Kabore; Passigbamba Tassere Kabore; Passingue Yaoba Kabore; Ratamalgda Alfred Kabore; Sibiri Kabore; Tibila Kabore; Toussaga Kabore; Sandaogo Kabre; Kraidi Frederic Kacou; Nogbou David Kacou; N'Tah Jules Kacou; N'Taye Emile Kacou; Assohoun Yacinthe Armel Kadjo; Ahoulou Moise Kadjo; Ayemou Laurent Kadjo; Ayemou Raymond Kadjo; Miessan Denis Kadjo; Rene Kadjo; Vangah Kadjo; Tanga Rasmane Kafando; Amon Barthelemy Kakjo; Esse Kakou; Ompire Kambou; Mamadou Kanate,
Plaintiffs-Appellees,

v.

Dow Chemical Company, a Delaware Corporation,
Defendant-Appellant.

Poupoin Jean Pimma; Dansine Plea; Achiedo Jonas Pokou; Koukoua Francois Popouin; Soumaila Porogo; Issiaka Porogo Abdou Quedraogo; Gnissiri Ramde; Raogo Randwidi; Tienoko Sagnon; Traore Saidou; Irissa Sakande; Naraogo Salou; Moussa Samake; Idrissa Sana; Salfo Sana; Saoumaila Sana; Edmond Sandwidi; Irissa Sandwidi; Larba Hamado Sandwidi; Nongma Sandwidi; Noufou Sandwidi; Ramane Sandwidi; Saydou Sandwidi; Emmanuel Sanga; Abdoulaye Sangare; Adama Sangare; Birama Sangare; Brahima Sangare; Mamadou Sangare; Salifou Sangare Sidiki Sangare; Souleymane Sangare; Hamade Sankara; Marou Sankara; Lanoussa Sanke; Youssoufi Sanogo; Kodjo Amboise Santin; Adama Sarba; Dariquio Rasmane Savadogo; Karim Savadogo; Leonard Savadogo; Ratogzita Marcel Savadogo; Ardoul Rahin Sawadogo; Hanidou Sawadogo; Issa Sawadogo; Ousseni Sawadogo; Palikidi Sawadogo; Rafael Sawadogo; Seidou Bodgo Sawadogo; Toukoumnogo Sawadogo; Yabre Hamado Sawadogo; Moussa Sedogo; Outtara Seidou; Konta Sekou; Naud Serge; Kone Siaka; Abdourahame Sidibe; Satigui Sidibe; Yaya Sidibe; Mamourou Sidide; Berthe Sidiki; Moussa Simpore; Paki Nweogo Simpore; Yamba Sinare; Toure Siramana; Dogobie Siribie; Lassina Siribie; Yaya Siribie; Noufou Sodre; Sekou Sogodogo; Kissi Antoine Somahin; Samouor Somda; Tikora Somda; Alfred Some; Anyel Some; Beliyan Jean Pierre Some; Dar Some; Francois Xavier Some; Gnonouor Some; Kounyere Some; Wineyel Some; Winidema Some; Salifou Sondo; Moussa

Sore; Songda Sorgho; Boureima Soro; Sidiki Sougue; Konate Souleymane; Lamine Ouattara Souleymane; Boukare Soulga; Zoumana Soumahoro; Kone Soumaila; Jerome Tade; Bi Tah Rene Tah; Camara Tamba; Lebende Sandwidi, Plaintiffs-Appellees,

v.

Dow Chemical Company, a Delaware Corporation, Defendant-Appellant.

Aka Georges Ayemou; Atteke Adolphe Ayemou; Nogbou Anatole Ayemou; Yacouba Ba; Ouattara Babala; Doungasse Babem; Noaga Baboloum; Baguibdue Bado; Oumarou Badolo; Yacouba Badolo; Kwasi Badu; Diakite Bourlaye; Gourassa Boussim; Badiou Bado; Zaboure Hamadou Boussim; Koudougou Denis Bagre; Adje Brou Brou; Roger Brou; Moussa Camara; Tiefini Camara; Doumbia Chio; Raogo Compaore; Issouf Compaore; Rasmane Compaore; Souleymane Compaore; Tilagagnande Compaore; Patende Congo; Wahabo Bagagnan; Adama Bagayogo; Vanga Francois Baka; Ouattarra Bakari; Konate Bakary; Bagnon Dit Mathias Bako; Kayoure Issaka Balima; Bakary Ballo; Sidik Coulibaly; Silambo Da; Brou Justin Dabire; Donbor Dabire; Milo Dabire Anona Dabiri; Kounou Bernard Dadegnon; Bah Albert Bah; Moussa Dagnogo; Francois Balma; Martin Emerite Dah; Craidy Antoine Daikri; Koffi Antoine Dainguy; Kraidi Joseph Dainguy; Agustine Danquah; Kouassi Clement Dede; Guehi Martin Dehe; Djakaridja Dembele; Gbeguele Bamba; Lacina Bamouni; Mahamoudou Bangre; Boulboure Banse; Hamidou Barry; Touni Baye; Bouilion Bayeli; Balele Bazie;

Dramane Belem; Yacouba Dene; Kovao Albert Dgri; Karamoko Diabate; Mady Diabate; Bozan Diakite; Mamadou Diakite; Boudramane Diallo; Sylvain Balma; Alhassane Diallo; Ukiebie Dianou; Issoufou Diallo; Moctar Diallo; Tinbila Diallo; Yaya Diarra; Bila Beogo; Boureima Bere; Melan Bile; Amangoua Moise Ble; Bakary Diarra; Bah Emile Ble; N'Taye Raymond Bosson; Koffi Bohoussou; Houinsou Joanie Boke; Niamke Bommoa; Pierre Bonnin; Tanoh Bony; Koudaogo Boudau; Gueu Christophe Boueu; Kindo Boubacou; Hamado Bougma; Kone Bourana; Saidou Bougma, Plaintiffs-Appellees,

v.

Dow Chemical Company, a Delaware Corporation, Defendant-Appellant.

Aka Francios Kovassi; Kradi Marcelin Kredi; Baore Salif Laguempendo; Wennemi Laguempendo; Outtara Lamine; Keita Lassane; Abdoulaye Loure; Paul Macouima; Hamadou Maiga; Diomande Mamadou; Ouattara Mamadou; Kountombasba Nana; Ousseini Mande; Soumare Moussa; Tano Jerome Mandessou; Soumaila Mariko; Diarassouba Matie; Kalfa Millogo; Sian Millogo; Matikpon Fidele Minavoa; Kraidy Eugene Mossoun; Moh Mossoun; Mossoun Raymond Mossoun; Cisse Mourinou; Kone Moussa; Dibiri Dramane Nana; Tiga Boureima Nana; Tinga Gilbert Nana; Tingra Nana; Rassablega Nanema; Yamba Nasere; Daogo Nasre; Raogo Natama; Yabre Natama; Ousmane Nebie; Edmond Clement Timoleon Nebout; Anoh Alphonse N'Gatta; Kouadio Eric N'Goran; Bomouan Frederic N'Guessan; Kokobo Etienne N'Guessan; Assi Michel Niama Essy Niamien; Dangui Eloi Niamke; Aka

Raphael Nintin; Ousmane Kone Nidiantien; Amou Nintin; Koudougou Francois Nikiema; Lougri Nikiema; Tegawinde Denis Nikiema; Tiga Nikiema; Camara Ningou; Anoh Louis N'Ko; Leon Nobou; Kone; Siakakone; Souleymane Know; Soumaila Kone; Tiekoro Know; Yaky Kone; Zakaria Kone; Issa Konkisre; Yetassida; Konkobo; Ibrahaim Knota; Basga Korsaga; Kadjo Edmond Koua; Kouassi Edmond Koua; Opokou Denis Koua; Aka German Koumelan; Marc Kouadio; Adama Kouraogo; Atsain Peter Kouadjo; Koffi Hilaire Leon Louakou; Kouame Kouame; Kouassi Kouame; Michel Kouame; Raymond Kouame; Ahimin Denis Kouamelian; Assemian Kouamilan; Antonin Kouassi; Ebia Paul Kouassi; Germain Ahou Kouassi; Nogbou Kouassi; Otron Severin Kouassi; Yao Djess Kouassi; Sanga George Kouassy; Bawaya Kouda; Zambende Koudougou; Rasmane Kouraogo; Soumane Kouraogo, Plaintiffs-Appellees,

v.

Dow Chemical Company, a Delaware Corporation, Defendant-Appellant.

Nos. 09-55138, 09-55145, 09-55147, 09-55148, 09-55153, 09-55156, 09-55160.

Argued and Submitted March 10, 2009.

Filed March 27, 2009.

Michael Brem (argued), Schirrmeister Diaz-Arrastia Brem LLP, Houston, TX; Edwin V. Woodsome, D. Barclay Edmundson, and Andrew S. Wong, Orrick, Herrington & Sutcliffe LLP, Los Angeles, CA, for defendant-appellant The Dow Chemical Company.

Raphael Metzger, Greg Coolidge, and Kathryn Darnell (argued), Metzger Law Group, Long Beach, CA, for plaintiffs-appellees Aka Raymond Tanoh, et al.

Appeal from the United States District Court for the Central District of California, Percy Anderson, District Judge, Presiding. D.C. Nos. 2:06-cv-07038-PA, 2:06-cv-07061-PA, 2:06-cv-07059-PA, 2:06-cv-07043-PA, 2:06-cv-07058-PA, 2:06-cv-07060-PA, 2:06-cv-07067-PA.

Before: HAWKINS, MARSHA S. BERZON and RICHARD R. CLIFTON, Circuit Judges.

BERZON, Circuit Judge:

We are asked to decide whether seven individual state court actions, each with fewer than one hundred plaintiffs, should be treated as one "mass action" eligible for removal to federal court under the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. No. 109-2, 119 Stat. 4 (2005). CAFA extends federal removal jurisdiction only to civil actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i). As neither the parties nor the trial court has proposed jointly trying the claims of one hundred or more plaintiffs in this case, we affirm the district court's order remanding each of the seven individual actions to state court.

FACTS

Defendant-Appellant The Dow Chemical Company ("Dow") appeals the district court's order remanding the toxic tort claims of 664 West African foreign nationals to state court. Plaintiffs allege that they were exposed to a Dow product containing 1,2-dibromo-3-chloropropane ("DBCP") while working on banana and pineapple plantations in the villages of Ono and Kakoukro in the Ivory Coast.[1] Plaintiffs claim to have suffered a host of serious and permanent injuries as a result of exposure to DBCP, including sterility and infertility. On September 27, 2006, plaintiffs filed suit against Dow and several other defendants in Los Angeles Superior Court, asserting claims for negligence, misbranding, defective design, fraudulent concealment, breach of implied warranties, and battery. They did so in seven separate actions, each of which included fewer than one hundred plaintiffs.

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[1] DBCP was commonly used in pesticides to control nematodes, microscopic worms that infest the roots of plants. Plaintiffs allege that although DBCP manufacturers realized that it was "the most potent testicular toxin known to science" as early as the 1950s, they continued to distribute agricultural products containing DBCP well into the 1980s. The EPA suspended domestic use of DBCP in 1979 but did not ban export of the pesticide. Despite the domestic ban, plaintiffs claim, Dow continued to supply pesticides containing DBCP to plantations in the Ivory Coast until at least 1986.

Dow subsequently filed a notice of removal to federal court, asserting both federal diversity jurisdiction and jurisdiction under CAFA. Dow argued, *inter alia*, that there was complete diversity between plaintiffs and all properly joined defendants; that several California defendants (AMVAC Chemical Corporation, Dole Food Company, Dole Fresh Fruit Company, Standard Fruit and Steamship Company, and Standard Fruit Company) had been fraudulently joined to defeat removal to federal court; and that the seven actions filed by plaintiffs, taken together, qualified as a "mass action" removable to federal court under CAFA. CAFA defines a "mass action" as

> any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

28 U.S.C. § 1332(d)(11)(B)(i). The statute specifies that a "'mass action' shall not include any civil action in which . . . (II) the claims are joined upon motion of a defendant; . . . or (IV) the claims have been consolidated or coordinated solely for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii).

The district court remanded the actions to state court *sua sponte*, holding that defendants had failed to show that the California companies were fraudulently joined and that removal under CAFA was not

proper because each of the actions involved fewer than the one hundred plaintiff statutory minimum for a "mass action" under CAFA. The district court specifically rejected defendants' argument that the claims should be removable because plaintiffs had "strategically sought to avoid federal jurisdiction" by filing several separate state court actions in groups fewer than one hundred. Emphasizing that CAFA specifically excludes actions in which claims have been "joined upon motion of a defendant" from the definition of a "mass action," the court concluded that "[to allow] removal in this case would effect an end-run around the limits Congress itself has imposed on removal pursuant to CAFA."

On appeal of the district court's *sua sponte* remand orders, a prior panel of this court vacated and remanded, holding that the district court exceeded its authority by ordering a remand *sua sponte*. *See Ayemou v. Amvac Chemical Corp.,* No. 06-56826 (9th Cir. Aug. 20, 2008). Plaintiffs subsequently filed a motion to remand their claims to state court, arguing, *inter alia,* that defendants had failed to demonstrate that plaintiffs' claims satisfied the $75,000 amount in controversy requirement for federal diversity jurisdiction or the $5,000,000 amount in controversy requirement for removing a "mass action" to federal court under CAFA. *See Abrego Abrego v. Dow Chem. Co.,* 443 F.3d 676, 682-86, 688-90 (9th Cir. 2006). Plaintiffs also claimed that none of the state court actions were "mass actions" under CAFA because

each of the seven suits involved fewer than one hundred plaintiffs.

The district court granted plaintiffs' motion to remand on October 21, relying almost verbatim on the reasoning contained in its earlier *sua sponte* orders. Dow sought permission to appeal the district court's refusal to exercise jurisdiction under CAFA pursuant to 28 U.S.C. § 1453(c).[2] This court granted permission to appeal on January 29, 2009.[3] We review the district court's remand order de novo. *See Abrego Abrego,* 443 F.3d at 679.

ANALYSIS

I.

The primary issue before us is whether seven individual state court actions, each with fewer than one hundred plaintiffs, should be treated as one "mass action" eligible for removal to federal court

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[2] Section 1453(c) governs removal of class actions to federal court, specifically providing that "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order." In *Amalgamated Transit Union Local 1309 v. Laidlaw Transit Services, Inc.*, 435 F.3d 1140 (9th Cir. 2006), we held that the last clause of § 1453(c) contains an error, construing the provision to require that the application to appeal be made not *more* than seven days after the district court's order. *Id.* at 1145-46.

[3] On February 3, 2009, this court *sua sponte* consolidated Dow's appeals in all seven cases.

under CAFA. To answer this question, we turn to the language of the statute, after first placing that language in context. *See Dodd v. United States,* 545 U.S. 353, 357 (2005).

Congress enacted CAFA in 2005 to "assure fair and prompt recoveries for class members with legitimate claims; [to] restore the intent of the framers . . . by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and [to] benefit society by encouraging innovation and lowering consumer prices." CAFA § 2, 119 Stat. at 5. As this description of the Act's purposes makes clear, CAFA was designed primarily to curb perceived abuses of the class action device which, in the view of CAFA's proponents, had often been used to litigate multi-state or even national class actions in state courts. *See id.* at 4-5. At the same time, however, section 4(a)(11) of the Act also extended federal removal jurisdiction to "mass actions," which were defined as "any civil action (except a [class action]) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." CAFA § 4(a)(11)(B)(i), 28 U.S.C. § 1332(d)(11)(B)(i). This "mass action" provision is at the heart of the current appeal.

[1] Although plaintiffs in a mass action, unlike in a class action, do not seek to represent the interests of parties not before the court, CAFA provides that a qualifying mass action "shall be deemed to be a class action" removable to federal

court under the Act, so long as the rest of CAFA's jurisdictional requirements are met. *See* 28 U.S.C. § 1332(d)(11)(A). Among these requirements, the aggregate amount in controversy must exceed "$5,000,000, exclusive of interest and costs," and at least one plaintiff must be a citizen of a state or foreign state different from that of any defendant. *See* 28 U.S.C. § 1332(d)(2), (6). Subsection (d)(11) further limits federal removal jurisdiction in a "mass action" to "those plaintiffs whose claims in a mass action satisfy the [$75,000] jurisdictional amount [in controversy] requirements" for federal diversity jurisdiction.[4] 28 U.S.C. § 1332(d)(11)(B)(i).

[2] Although CAFA thus extends federal diversity jurisdiction to both class actions and certain mass actions, the latter provision is fairly narrow. As noted above, CAFA's "mass action" provision applies only to civil actions in which the "monetary relief claims of 100 or more persons are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). By its plain terms, § 1332(d)(11) therefore does not apply to plaintiffs' claims in this case, as none of the seven state court actions involves the claims of one hundred or more plaintiffs, and neither the parties nor the trial court has proposed consolidating the actions for trial.

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[4] In *Abrego Abrego*, we left open the question whether this clause requires that one hundred or more plaintiffs individually satisfy the $75,000 amount in controversy requirement for federal diversity jurisdiction to qualify as a "mass action" under CAFA. *See* 443 F.3d at 686-88. Given our disposition in this case, we once again do not decide the issue.

[3] "[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank,* 530 U.S. 1, 6 (2000) (internal quotation marks omitted). In this case, concluding that plaintiffs' claims fall outside CAFA's removal provisions is not absurd, but rather is consistent with both the well-established rule that plaintiffs, as masters of their complaint, may choose their forum by selecting state over federal court and with the equally well-established presumption against federal removal jurisdiction. *See Lowdermilk v. U.S. Bank Nat'l Ass'n,* 479 F.3d 994, 998-99 (9th Cir. 2007). We therefore hold that CAFA's "mass action" provisions do not permit a defendant to remove to federal court separate state court actions, each involving the monetary claims of fewer than one hundred plaintiffs.

II.

[4] In spite of the statutory language, Dow contends that allowing plaintiffs to "evade" CAFA by "artificially structur[ing]" their lawsuits to avoid removal to federal court would be inconsistent with congressional purpose. Relying on both the Act's legislative history and two recent, out-of-circuit decisions interpreting a separate provision of the Act, Dow urges us to conclude that plaintiffs' seven actions, viewed together, constitute a single "mass action" under CAFA. Dow's arguments are unpersuasive, for several reasons.

[5] First, as the district court correctly noted, Congress appears to have foreseen the situation presented in this case and specifically decided the issue in plaintiffs' favor. In addition to requiring that a "mass action" include the claims of at least one hundred plaintiffs "proposed to be tried jointly," § 1332(d)(11) specifically provides that "the term 'mass action' shall *not* include any civil action in which . . . the claims are joined upon motion of a defendant." 28 U.S.C. § 1332(d)(11)(B)(ii)(II) (emphasis added). Congress anticipated, in other words, that defendants like Dow might attempt to consolidate several smaller state court actions into one "mass action," and specifically directed that such a consolidated action was *not* a mass action eligible for removal under CAFA.

[6] In light of this statutory directive, we fail to see how the result could be any different in a case such as this one, in which Dow – while never formally moving to consolidate plaintiffs' claims – urges us to treat those claims as if they should have been consolidated for purposes of removal under CAFA. The absence of a formal motion cannot blink away the fact that Dow, the defendant, is asking us to consolidate separate actions for purposes of applying the "mass action" provision. A "motion" is nothing more than "a written or oral application requesting a court to make a specified ruling or order," *Black's Law Dictionary* 1036 (8th ed. 2004), so Dow's request precisely fits the statutory limitation. By expressly removing state court actions "joined upon motion of a defendant" from CAFA's reach, Congress intended to

allow suits filed on behalf of fewer than one hundred plaintiffs to remain in state court, notwithstanding defendants' wishes for consolidation, however expressed.

[7] Second, CAFA contains similar language regarding claims "consolidated or coordinated solely for pretrial proceedings," again specifying that such actions do not qualify as "mass actions." *See* 28 U.S.C. § 1332(d)(11)(B)(ii)(IV). This provision reinforces our conclusion that Congress intended to limit the numerosity component of mass actions quite severely by including only actions in which the trial itself would address the claims of at least one hundred plaintiffs. In the face of this detailed definition of a "mass action," we cannot sensibly entertain the notion that Congress intended to allow courts to override the considered legislative limitations on the "mass action" concept.

[8] Third, although Dow relies heavily on CAFA's legislative history to argue that plaintiffs should not be permitted to "game" jurisdictional statutes to remain in state court, this legislative history – to the extent it is pertinent[5] – merely

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[5] Dow relies heavily on a Senate Committee report that was not printed until ten days *after* CAFA's passage into law. *See* S. Rep. No. 109-14, at 79 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 73; *Abrego Abrego*, 443 F.3d at 683. The Report is therefore of minimal, if any, value in discerning congressional intent, as it was not before the Senate at the time of CAFA's enactment. *See Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 57-58 (2d Cir. 2006) (specifically disclaiming reliance on S. Rep. No. 109-14).

reaffirms our conclusion that plaintiffs' claims are not removable. Dow argues that CAFA's primary purpose was to prevent plaintiffs' lawyers from abusing the class action device, often by filing several "copycat" actions alleging the same injuries on behalf of the same class of plaintiffs in different state courts. While this may well be true, Dow fails to explain how such concerns apply to this case, in which seven *different* groups of plaintiffs, none of which purport to represent a nationwide class, allege the same injuries in the *same* court. Certainly, competing claims to represent the same class of plaintiffs might raise concerns that overlapping or identical claims would be litigated in multiple jurisdictions. But such concerns simply do not apply in this case, in which plaintiffs expressly elected *not* to proceed as a class.

[9] Moreover, while Dow cites a litany of passages from CAFA's legislative history evincing general concern over "copycat" class actions and jurisdictional "gamesmanship," those sections of the Senate Report specifically addressing CAFA's "mass action" provisions support our interpretation of the statute. The Report describes "mass actions," for example, as "suits that are brought on behalf of numerous named plaintiffs who claim that their suits present common questions of law or fact that should be tried together even though they do not seek class certification status," thus emphasizing that the decision to try claims jointly and thus qualify as a "mass action" under CAFA should remain, as we concluded above, with plaintiffs. S. Rep. No. 109-14, at 46; *see also id.* ("Under subsection 1332(d)(11), any

civil action *in which 100 or more named parties* seek to try their claims for monetary relief together will be treated as a class action for jurisdictional purposes." (emphasis added)). Similarly, the Report specifies that a "mass action" meeting CAFA's jurisdictional requirements "would not be eligible for federal jurisdiction if . . . the defendants (not the plaintiffs) sought to join the claims." *Id.* These passages bolster our conclusion that removal under CAFA is limited to cases in which one hundred or more plaintiffs elect to try their claims together.

Fourth, the out-of-circuit cases relied upon by Dow do not detract from our conclusion, as none of them addressed CAFA's "mass action" or numerosity provisions. Both *Freeman v. Blue Ridge Paper Products, Inc.,* 551 F.3d 405 (6th Cir. 2008), and *Proffitt v. Abbott Laboratories,* 2008 WL 4401367 (E.D. Tenn. Sept. 23, 2008), involved plaintiffs who attempted to split their claims into multiple suits covering discrete time periods so as to expand their recovery without triggering CAFA's $5 million amount in controversy requirement. In *Freeman,* for example, plaintiffs divided their nuisance class action against a paper mill into "five separate suits covering distinct six-month time periods, with plaintiffs' limiting the total damages for each suit to less than CAFA's $5 million threshold." 551 F.3d at 406. In *Proffitt,* plaintiffs similarly divided their anti-trust class action into "eleven lawsuits that are identical except for the time periods that they allege to cover." 2008 WL 4401367 at *1. Each of the eleven complaints included a disclaimer

limiting damages for the covered time period to $4,999,000. *Id.* at *2.

In both cases, the court rejected plaintiffs' creative attempts to avoid CAFA's amount in controversy requirement, holding that removal was proper because the time divisions were "completely arbitrary," as there was "no colorable reason for breaking up the lawsuits in this fashion, other than to avoid federal jurisdiction." *Freeman,* 551 F.3d at 407; *Proffitt,* 2008 WL 4401367 at *2. Central to the courts' holdings, however, was the fact that both sets of plaintiffs split their claims in an effort to seek well over $5 million in total damages without triggering federal removal jurisdiction. As the Sixth Circuit explained, plaintiffs are generally allowed to plead around federal jurisdiction at a cost: they must limit the damages they seek to less than CAFA's $5 million threshold. *See* 551 F.3d at 409. Permitting plaintiffs to split their claims arbitrarily by time period threatened to subvert this rule, enabling plaintiffs to seek well over $5 million – in *Freeman,* for example, almost $25 million among the five suits – without subjecting themselves to federal removal jurisdiction. The court rebuffed this end-run around CAFA, holding that "where recovery is expanded, rather than limited, by virtue of splintering of lawsuits for no colorable reason, the total of such identical splintered lawsuits may be aggregated." *Id.*; *see also Proffitt,* 2008 WL 4401367 at *5.

The concerns animating *Freeman* and *Proffitt* simply are not present in this case, as none of the seven groups of plaintiffs has divided its claims into separate lawsuits to expand recovery. To the contrary, each of the seven state court actions was brought on behalf of a *different* set of plaintiffs, meaning that none of the plaintiff groups stands to recover in excess of CAFA's $5 million threshold between the seven suits.

More importantly, neither *Freeman* nor *Proffitt* addressed the specific statutory provisions at issue here. Both cases involved class actions rather than mass actions, and it was undisputed that both plaintiff classes easily exceeded CAFA's one hundred plaintiff threshold. *See Freeman,* 551 F.3d at 406 (describing plaintiff class of three hundred landowners); *Proffitt,* 2008 WL 4401367 at *2 (noting that plaintiffs in anti-trust class action did not challenge removal on basis of class size). Neither court therefore had the opportunity to address whether several individual state court actions, filed on behalf of different groups of fewer than one hundred plaintiffs, should be treated as one "mass action" under CAFA.[6] Moreover, both

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[6] The same is true of another recent case cited by Dow, *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759 (7th Cir. 2008). In that case, 144 plaintiffs sought damages for exposure to chemicals that had allegedly escaped from a nearby wood-processing plant. *Id.* at 761. The court held that by filing a complaint on behalf of 144 residents injured by the leak, plaintiffs had proposed jointly trying the claims of one hundred or more people, triggering removal under CAFA. *Id.* at 761-62.

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Freeman and *Proffitt* involved an issue – the splitting of plaintiffs' claims by time period – as to which CAFA's class action provisions are completely silent. In this case, by contrast, the statute speaks directly to the issue at hand, specifying that claims "joined upon motion of a defendant" do not qualify for removal to federal court under CAFA.

Dow, of course, urges us to adopt a broader reading of *Freeman* and *Proffitt,* arguing that those cases stand for the general proposition that plaintiffs' lawyers cannot "game" the system by artificially structuring their suits so as to avoid CAFA jurisdiction. The decisions themselves, however, disclaim any such reading. The Sixth Circuit specifically "limited [its holding] to the situation where there is no colorable basis for dividing up the sought – for retrospective relief *into separate time periods,* other than to frustrate CAFA." *Freeman,* 551 F.3d at 409 (emphasis added). Moreover, as noted above, *Freeman*'s holding was limited to cases "where recovery is expanded, rather than limited, by virtue of splintering of lawsuits." *Id.* In the same paragraph, the Sixth Circuit reaffirmed the general rule that "if a plaintiff 'does not desire to try his case in the federal court he may resort to the expedient of suing for less

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The Seventh Circuit had no occasion to consider whether multiple state court actions involving fewer than one hundred plaintiffs could be removed under CAFA as a single mass action, as plaintiffs' complaint in *Bullard,* on its face, asserted claims on behalf of more than one hundred individuals.

than the jurisdictional amount, and though he would be justly entitled to more, the defendant cannot remove.'" *Id.* (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938)).

III.

[10] In short, by its plain language, CAFA's "mass action" provisions apply only to civil actions in which "monetary relief claims of 100 or more persons are proposed to be tried jointly." 28 U.S.C. § 1332(d)(11)(B)(i). None of the seven state court actions removed to federal court by Dow involves the claims of one hundred or more persons proposed to be tried jointly, and the actions are therefore not removable to federal court under CAFA.

Plaintiffs' separate state court actions may, of course, become removable at same later point if plaintiffs seek to join the claims for trial. *See Bullard*, 535 F.3d at 761-62. We express no opinion as to whether a state court's *sua sponte* joinder of claims might allow a defendant to remove separately filed actions to federal court as a single "mass action" under CAFA.

In light of our disposition, we also do not reach plaintiffs' alternative argument that Dow has failed to establish that plaintiffs' claims satisfy CAFA's

jurisdictional amount in controversy requirements. *See generally Abrego Abrego*, 443 F.3d at 680-90.

AFFIRMED.

2008 WL 4691004 (C.D. Cal.)

United States District Court,
C.D. California.
Aka Raymond TANOH, et al.
v.
AMVAC CHEMICAL CORP., et al.
Kallilou Diarrassouba, et al.
v.
AMVAC Chemical Corp., et al.
Poupoin Jean Pimma, et al.
v.
AMVAC Chemical Corp., et al.
Ahoulou Raphael Kangah, et al.
v.
AMVAC Chemical Corp., et al.
Aka Georges Ayemou, et al.
v.
AMVAC Chemical Corp., et al.
Akebo Abagninin, et al.
v.
AMVAC Chemical Corp., et al.
Aka Francois Kovassi, et al.
v.
AMVAC Chemical Corp., et al.

Nos. CV 06-7038 PA (JTLx), CV 06-7059 PA (JTLx), CV 06-7067 PA (JTLx), CV 06-7043 PA (JTLx), CV 06-7060 PA (JTLx), CV 06-7058 PA (JTLx), CV 06-7061 PA (JTLx).

Oct. 21, 2008.

Proceedings: IN CHAMBERS-COURT ORDER

PERCY ANDERSON, District Judge.

Karen Park, Deputy Clerk.

Before the Court is a Motion to Remand filed by plaintiffs in the actions listed above (the "State Tort Actions"). Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument. The hearing calendared for October 20, 2008, is vacated, and the matter taken off calendar.

The State Tort Actions were removed by defendants The Dow Chemical Company and Shell Oil Company (collectively, the "Removing Defendants") on either November 2 or 3, 2006. The Removing Defendants asserted that jurisdiction existed on the basis of diversity of citizenship and that the State Tort Actions were removable pursuant to 28 U.S.C. § 1441 or, alternatively, pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1453.

Each of the State Tort Actions involve claims brought by fewer than 100 plaintiffs, each of whom are West African foreign nationals who lived and worked on banana and pineapple plantations in the Ivory Coast. Their Complaints, each of which was filed on September 27, 2006, in Los Angeles County Superior Court, seek damages for personal injuries resulting from exposure to 1,2-dibromo-3-chloropropane ("DBCP"), a nematocide that was used on the plantations until the mid-1980s. All of the causes of action in this action are brought pursuant to California state law. All of the plaintiffs in the State Tort Actions are also plaintiffs in another action filed in this Court, asserting a federal claim under

the Alien Tort Claims Act, 28 U.S.C. § 1850 (the "Alien Tort Claims Action"). In total, there are 668 plaintiffs in the Alien Tort Claims Action. The Alien Tort Claims Action was originally assigned to this Court. After the Removing Defendants filed their Notices of Removal of the State Tort Actions, the Court accepted transfers of those actions as related cases. As the State Tort Actions were transferred to this Court, it remanded them back to state court because of what it considered procedural defects in the Notices of Removal.

The first of the State Tort Actions to be remanded was *Ayemou,* CV 06-7060 PA (JTLx), on November 15, 2006. Plaintiffs filed a Motion to Remand the remaining State Tort Actions on December 1, 2006. The Motion, filed in the Alien Tort Claims Action, individually identified each of the then-pending State Tort Actions. The Court remanded those actions on December 4, 2006. The Removing Defendants appealed the Court's orders remanding the State Court Actions. In a Mandate filed on September 11, 2008, the Ninth Circuit reversed this Court's orders remanding the State Tort Actions. Specifically, the Ninth Circuit ruled that this Court erred by remanding the actions *sua sponte* without providing plaintiffs with an opportunity to waive the procedural defects contained in the Notices of Removal. *See Ayemou v. AMVAC Chem. Corp.,* No. 06-56826, 2008 WL 4107286, at *1 (9th Cir. Aug. 20, 2008). Plaintiffs filed the instant Motion to Remand on September 19, 2008.

As an initial matter, the Removing Defendants argue that plaintiffs' Motion to Remand is procedurally defective in that it was filed in the Alien Tort Claim Action rather than in the individual State Tort Actions. The Court rejects this argument. The Removing Defendants, who are parties in both the State Tort Actions and the Alien Tort Claim Action received notice of the Motion to Remand. The Motion to Remand clearly states that it applies to each of the State Tort Actions, even though it was not filed in those actions. The Removing Defendants have filed an Opposition to the Motion to Remand addressing what they consider to be the substantive problems with plaintiffs' Motion to Remand. Under these circumstances, the Court declines to deny an otherwise properly filed motion simply because plaintiffs erroneously, but in good faith, filed it in the wrong, but related, case.

The Court also rejects the Removing Defendants' contention that the Motion to Remand is untimely. Pursuant to 28 U.S.C. § 1447(c), a party challenging a procedurally defective Notice of Removal must do so within thirty days. Here, plaintiffs' original Motion to Remand was filed within thirty days of the date of removal in all of the State Tort Actions.[1] As a result,

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[1] The Removing Defendants in the *Ayemou* action filed the Notice of Removal on November 3, 2006. This Court issued its order remanding the action on November 15, 2006. Therefore twelve days of the thirty days in which a procedural defect may be brought to the Court's attention by way of a Motion to Remand had elapsed. *See* 28 U.S.C. § 1447(c). Another eight

(Continued on following page)

plaintiffs did timely challenge the propriety of the Notices of Removal. But for the Court's erroneous *sua sponte* remand of the actions, plaintiffs' challenges to the Notices of Removal would have been heard by the Court. Plaintiffs certainly should not lose their right to timely challenge the propriety of the Notices of Removal because of the Court's errors. The Court therefore concludes that the Motion to Remand is timely.

Because the Court has rejected the Removing Defendants' procedural arguments concerning the Motion to Remand, it will next address the substance of potential defects in the Notices of Removal. In addition to the Removing Defendants, the plaintiffs named as defendants AMVAC Chemical Corp. and four fruit companies, Dole Food Co., Inc., Dole Fresh Fruit Co., Standard Fruit Co., and Standard Fruit and Steamship Co. The Complaints allege that AMVAC, along with the Removing Defendants, manufactured and sold products containing DBCP and that the fruit companies used those products on the plantations where the plaintiffs lived and worked. According to the Notices of Removal, AMVAC was the first defendant to be served on October 6, 2006, and

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days elapsed since this Court once again acquired jurisdiction over these actions before plaintiffs filed the Motion to Remand. *See Ayemou,* 2008 WL 4107286, at *1 n. 2 ("Ayemou still had time left in which to file a motion to remand on the basis of a non-jurisdictional defect under § 1447(c) when the district court preempted that process by its *sua sponte* ruling.").

the Dole companies were served on October 13. The Notices of Removal also state that AMVAC, the Dole companies, and Standard Fruit Co. are all citizens of California.

Federal courts have subject matter jurisdiction only over matters authorized by the Constitution and Congress. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S. Ct. 1326, 1331, 89 L. Ed. 2d 501 (1986). Jurisdiction may be based on complete diversity of citizenship, requiring each plaintiff to have a different citizenship from each defendant. *See* 28 U.S.C. § 1332; *Owen Equip. & Erection Co. v. Kroger,* 437 U.S. 365, 373, 98 S. Ct. 2396, 2402, 57 L. Ed. 2d 274 (1978); *Strawbridge v. Curtiss,* 7 U.S. (3 Cranch.) 267, 2 L. Ed. 435 (1806). A suit filed in state court may be removed to federal court if the federal court would have had original jurisdiction. 28 U.S.C. § 1441(a). An action may be remanded to state court if the federal court lacks subject matter jurisdiction. 28 U.S.C. § 1447(c).

"The removal statute is strictly construed against removal jurisdiction and any doubt must be resolved in favor of remand." *Hofler v. Aetna U.S. Healthcare of California, Inc.*, 296 F.3d 764, 767 (9th Cir. 2002). "The burden of establishing federal jurisdiction is on the party seeking removal." *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999). As the parties seeking to invoke this Court's jurisdiction, the Removing Defendants bear the burden of proving that jurisdiction exists. *Scott v. Breeland,* 792 F.2d 925, 927 (9th Cir. 1986). Diversity jurisdiction must

appear on the face of the pleading. *Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group,* 823 F.2d 302, 304 (9th Cir. 1987) (noting that neither the removal petition nor the record indicated diversity of the parties).

Even where the complete diversity requirement is met, removal is not permitted where one of the defendants is a "citizen of the State in which such action is brought." 28 U.S.C. § 1441(b). In their Notice of Removal, the Removing Defendants acknowledge that several of the other defendants are citizens of California. Nonetheless, they maintain that these defendants have been fraudulently joined. If a plaintiff "fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent." *McCabe v. Gen. Foods Corp.,* 811 F.2d 1336, 1339 (9th Cir. 1987). If the Court finds that the joinder of a non-diverse defendant is fraudulent, that defendant's presence in the lawsuit is ignored for the purposes of determining diversity. *See, e.g., Morris v. Princess Cruises, Inc.,* 236 F.3d 1061, 1067 (9th Cir. 2001).

"There is a presumption against finding fraudulent joinder, and defendants who assert that plaintiff has fraudulently joined a party carry a heavy burden of persuasion." *Plute v. Roadway Package Sys., Inc.,* 141 F. Supp. 2d 1005, 1008 (N.D. Cal. 2001). A claim of fraudulent joinder should be denied if there is any possibility that the plaintiff may prevail on the cause of action against the in-state defendant.

See id. at 1008, 1012. "The standard is not whether plaintiffs will actually or even probably prevail on the merits, but whether there is a possibility that they may do so." *Lieberman v. Meshkin, Mazandarani,* 1996 WL 732506, at *3 (N.D. Cal. Dec. 11, 1996). "In determining whether a defendant was joined fraudulently, the court must resolve 'all disputed questions of fact and all ambiguities in the controlling state law in favor of the non-removing party.'" *Plute,* 141 F. Supp. 2d at 1008 (quoting *Dodson v. Spiliada Maritime Corp.,* 951 F.2d 40, 42-43 (5th Cir. 1992)). Moreover, any doubts concerning the sufficiency of a cause of action due to inartful, ambiguous, or technically defective pleading must be resolved in favor of remand. *See id.*

In the Notice of Removal, the Removing Defendants argue that AMVAC was fraudulently joined because it did not sell any DBCP to customers in the Ivory Coast or elsewhere in Africa. In support of that claim, they provide a declaration from AMVAC's Vice Chairman of the Board of Directors who states that he has reviewed all of AMVAC's sales records and determined the following:

> AMVAC had no sales of DBCP to any customer where the shipping address or the shipment was designated or marked for the Ivory Coast. For that matter, AMVAC had no sales of DBCP to any customer where the shipping address or the shipment was designated or marked for any location in Africa.

(Notice of Removal Ex. D, ¶ 7.) Though this evidence is presumably sufficient to show that AMVAC did not itself ship any DBCP to the plantations where the plaintiffs lived and worked, it does not eliminate the possibility that AMVAC's products made it to those plantations through other means. This proof is particularly insufficient given the plaintiffs' allegation that the other defendants "purchased DBCP in the United States and re-sold and distributed DBCP from the United States to their subsidiaries and affiliates in developing countries around the world, including the Ivory Coast." (Compl. ¶ 34.) Accordingly, the Removing Defendants have failed to meet their heavy burden of showing that AMVAC was fraudulently joined.

The Removing Defendants also argue that the Dole companies were fraudulently joined because they:

> [N]ever owned, managed, controlled or operated any banana or pineapple farms in the Ivory Coast. Nor are any of the Dole Defendants successors to any entity that did. And the Dole Defendants did not employ any of the plaintiffs in the Ivory Coast. Neither did the Dole Defendants control or direct DBCP application on banana or pineapple plantations in Ivory Coast. Lastly, the Dole Defendants did not purchase, distribute, or supply DBCP-containing products for use on banana or pineapple plantations in Ivory Coast.

(Notice of Removal ¶ 21.) In support of this argument, the Removing Defendants provide evidence that Dole Food Co. did not acquire any ownership interest in banana or pineapple plantations in the Ivory Coast until 1992 and argue that this was well after the plaintiffs were allegedly exposed to DBCP. (*See id.* Ex. E, ¶ 3; Compl. ¶ 141.) They also argue that even now, Dole's interest is only as a parent corporation several times removed from any entity that actually manages banana or pineapple plantations in the Ivory Coast.

Though the Removing Defendants are correct that a "parent corporation is not liable for the torts of its subsidiaries simply because of stock ownership," *Inst. of Veterinary Pathology, Inc. v. California Health Labs., Inc.*, 116 Cal. App. 3d 111, 120, 172 Cal. Rptr. 74, 78 (Ct. App. 1981), this argument fails to take into account the numerous theories of liability plaintiffs have asserted against the Dole companies. For example, the Removing Defendants have failed to establish that it would be impossible for the plaintiffs to recover on their allegations that Dole is liable as "aider, abbetor, joint venturer, partner, agent, principal, successor-in-interest, surviving corporation, fraudulent transferor, fraudulent transferee, controller, alter-ego, licensee, licensor, patent holder, trademark holder, co-conspirator and/or indemnitor of Defendants and their subsidiary and affiliated corporations and entities in doing the wrongful acts alleged." (Compl. ¶ 18.) Further, the Removing Defendants' argument misrepresents the nature of

the plaintiffs' allegation regarding their exposure to DBCP. Though the Removing Defendants would construe the Complaint as alleging that all exposure occurred before 1986, the plaintiffs actually allege that DBCP was used "until *at least* 1986" (Compl. ¶ 141 (emphasis added).) Thus, proof that Dole Food Co. had no ownership interest in the relevant plantations until 1992 is not necessarily dispositive of their claims. Accordingly, the Removing Defendants have failed to meet their heavy burden of showing that Dole Food Co. and Dole Fresh Fruit Co. were fraudulently joined.

Thus, the Removing Defendants have failed to show that none of the parties "properly joined and served as defendants" is a citizen of the state of California, where this action was brought. *See* 28 U.S.C. § 1441(b). Nonetheless, the Removing Defendants argue that this action is still removable pursuant to CAFA because it is a "mass action" that is removable "without regard to whether any defendant is a citizen of the State in which the action is brought." *See* 28 U.S.C. §§ 1332(11), 1453(b). Under CAFA, a mass action is defined as "any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact." § 1332(11)(B)(i). Each individual State Tort Action involves less than 100 plaintiffs, however, and therefore does not qualify as a mass action removable under CAFA.

The Removing Defendants argue that the Court should nonetheless find the State Tort Actions removable because the plaintiffs have strategically sought to avoid federal jurisdiction over their state-law claims pursuant to CAFA by filing one action involving 668 plaintiffs in federal court and several separate actions involving the same plaintiffs, but in groups less than 100, in state court. Defendants cite no authority holding that plaintiffs may not file multiple actions, each with fewer than 100 plaintiffs, to work within the confines of CAFA to keep their state-law claims in state court and the Court declines to do so. As a general matter, "[t]he removal statute is strictly construed against removal jurisdiction and any doubt must be resolved in favor of remand." *Hofler,* 296 F.3d at 767. Further, Congress has itself indicated that the type of relief Defendants seek here is not available under CAFA. Congress could have easily made removal available in situations like this one by enabling state-court defendants to consolidate related claims brought by groups of less than 100 plaintiffs and then remove the resulting action. Instead, Congress expressly rejected the use of this strategy by excluding actions in which claims have been "joined upon motion of a defendant" from the definition of "mass action." *See* 28 U.S.C. § 1332(11)(B)(ii)(II). Thus, allowing removal in this case would effect an end-run around the limits Congress itself has imposed on removal pursuant to CAFA. *See Lowdermilv v. U.S. Bank Nat'l Ass'n,* 479 F.3d 994, 998-99 (9th Cir. 2007) (applying the "well established" rule that a plaintiff is the "master of her

complaint" to affirm remand of an action removed under CAFA).

For the foregoing reasons, the Court hereby remands the State Tort Actions to Los Angeles County Superior Court, Case Nos. BC359265 (*Tanoh*), BC359261 (*Diarrassouba*), BC359264 (*Pimma*), BC359262 (*Kangah*), BC359259 (*Abagninin*), and BC359263 (*Kovassi*), and BC359260 (*Ayemou*). *See* 28 U.S.C. § 1447(c).

IT IS SO ORDERED.

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28 U.S.C.A. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d)(1) In this subsection –

(A) the term "class" means all of the class members in a class action;

(B) the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action;

(C) the term "class certification order" means an order issued by a court approving the treatment of some or all aspects of a civil action as a class action; and

(D) the term "class members" means the persons (named or unnamed) who fall within the definition of the proposed or certified class in a class action.

(2) The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which –

(A) any member of a class of plaintiffs is a citizen of a State different from any defendant;

(B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or

(C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

(3) A district court may, in the interests of justice and looking at the totality of the circumstances, decline to exercise jurisdiction under paragraph (2) over a class action in which greater than one-third but less than two-thirds of the members of all proposed plaintiff classes in the aggregate and the primary defendants are citizens of the State in which the action was originally filed based on consideration of –

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

(4) A district court shall decline to exercise jurisdiction under paragraph (2) –

(A)(i) over a class action in which –

(I) greater than two-thirds of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was originally filed;

(II) at least 1 defendant is a defendant –

(aa) from whom significant relief is sought by members of the plaintiff class;

(bb) whose alleged conduct forms a significant basis for the claims asserted by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and

(III) principal injuries resulting from the alleged conduct or any related conduct of each defendant were incurred in the State in which the action was originally filed; and

(ii) during the 3-year period preceding the filing of that class action, no other class action has been filed asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons; or

(B) two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed.

(5) Paragraphs (2) through (4) shall not apply to any class action in which –

(A) the primary defendants are States, State officials, or other governmental entities against whom the district court may be foreclosed from ordering relief; or

(B) the number of members of all proposed plaintiff classes in the aggregate is less than 100.

(6) In any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs.

(7) Citizenship of the members of the proposed plaintiff classes shall be determined for purposes of paragraphs (2) through (6) as of the date of filing of the complaint or amended complaint, or, if the case stated by the initial pleading is not subject to Federal jurisdiction, as of the date of service by plaintiffs of an amended pleading, motion, or other paper, indicating the existence of Federal jurisdiction.

(8) This subsection shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.

(9) Paragraph (2) shall not apply to any class action that solely involves a claim –

> **(A)** concerning a covered security as defined under 16(f)(3)[1] of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[2]) and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));
>
> **(B)** that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by

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[1] So in original. Probably should be preceded by "section".

[2] So in original. Probably should be "77p(f)(3)".

virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(C) that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(10) For purposes of this subsection and section 1453, an unincorporated association shall be deemed to be a citizen of the State where it has its principal place of business and the State under whose laws it is organized.

(11)(A) For purposes of this subsection and section 1453, a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.

(B)(i) As used in subparagraph (A), the term "mass action" means any civil action (except a civil action within the scope of section 1711(2)) in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

(ii) As used in subparagraph (A), the term "mass action" shall not include any civil action in which –

(I) all of the claims in the action arise from an event or occurrence in the State in which the action was filed, and that allegedly resulted in injuries in that State or in States contiguous to that State;

(II) the claims are joined upon motion of a defendant;

(III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action; or

(IV) the claims have been consolidated or coordinated solely for pretrial proceedings.

(C)(i) Any action(s) removed to Federal court pursuant to this subsection shall not thereafter be transferred to any other court pursuant to section 1407, or the rules promulgated thereunder, unless a majority of the plaintiffs in the action request transfer pursuant to section 1407.

(ii) This subparagraph will not apply –

(I) to cases certified pursuant to rule 23 of the Federal Rules of Civil Procedure; or

(II) if plaintiffs propose that the action proceed as a class action pursuant to rule 23 of the Federal Rules of Civil Procedure.

(D) The limitations periods on any claims asserted in a mass action that is removed to Federal court pursuant to this subsection shall be deemed tolled during the period that the action is pending in Federal court.

(e) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(June 25, 1948, ch. 646, 62 Stat. 930; July 26, 1956, ch. 740, 70 Stat. 658; Pub. L. 85-554, § 2, July 25, 1958, 72 Stat. 415; Pub. L. 88-439, § 1, Aug. 14, 1964, 78 Stat. 445; Pub. L. 94-583, § 3, Oct. 21, 1976, 90 Stat. 2891; Pub. L. 100-702, title II, §§ 201(a), 202(a), 203(a), Nov. 19, 1988, 102 Stat. 4646; Pub. L. 104-317, title II, § 205(a), Oct. 19, 1996, 110 Stat. 3850; Pub. L. 109-2, § 4(a), Feb. 18, 2005, 119 Stat. 9.)

28 U.S.C.A. § 1453. Removal of class actions

(a) Definitions. – In this section, the terms "class", "class action", "class certification order", and "class member" shall have the meanings given such terms under section 1332(d)(1).

(b) In general. – A class action may be removed to a district court of the United States in accordance with section 1446 (except that the 1-year limitation under section 1446(b) shall not apply), without regard to whether any defendant is a citizen of the State in which the action is brought, except that such action may be removed by any defendant without the consent of all defendants.

(c) Review of remand orders. –

(1) In general. – Section 1447 shall apply to any removal of a case under this section, except that notwithstanding section 1447(d), a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed if application is made to the court of appeals not less than 7 days after entry of the order.

(2) Time period for judgment. – If the court of appeals accepts an appeal under paragraph (1), the court shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed, unless an extension is granted under paragraph (3).

(3) **Extension of time period.** – The court of appeals may grant an extension of the 60-day period described in paragraph (2) if –

(A) all parties to the proceeding agree to such extension, for any period of time; or

(B) such extension is for good cause shown and in the interests of justice, for a period not to exceed 10 days.

(4) **Denial of appeal.** – If a final judgment on the appeal under paragraph (1) is not issued before the end of the period described in paragraph (2), including any extension under paragraph (3), the appeal shall be denied.

(d) Exception. – This section shall not apply to any class action that solely involves –

(1) a claim concerning a covered security as defined under section 16(f)(3) of the Securities Act of 1933 (15 U.S.C. 78p(f)(3)[1] and section 28(f)(5)(E) of the Securities Exchange Act of 1934 (15 U.S.C. 78bb(f)(5)(E));

(2) a claim that relates to the internal affairs or governance of a corporation or other form of business enterprise and arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized; or

(3) a claim that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any

---

[1] So in original. Probably should be "77p(f)(3)".

security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder).

(Added Pub. L. 109-2, § 5(a), Feb. 18, 2005, 119 Stat. 12.)

(4)

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No. 08-1589

IN THE
Supreme Court of the United States

DOW CHEMICAL CO.,

Petitioner,

v.

AKA RAYMOND TANOH, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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July 2009

QUESTION PRESENTED

Did the court of appeals err in applying the unambiguous language of the Class Action Fairness Act ("CAFA") and holding that claims "joined upon motion of a defendant," 28 U.S.C. § 1332(d)(11)(B)(ii)(II), are not "mass actions" subject to removal under CAFA?

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INTRODUCTION

Dow Chemical Co. urges this Court to grant certiorari to review the court of appeals' holding that seven separate actions brought in state court by seven unique groups of plaintiffs cannot be joined by the defendant and considered a "mass action" removable to federal court under the Class Action Fairness Act ("CAFA"). Dow has failed to present any compelling reason to grant certiorari.

First, Dow contends that the decision below is contrary to the Sixth Circuit's holding in *Freeman v. Blue Ridge Paper Products, Inc.*, 551 F.3d 405 (6th Cir. 2008). *Freeman*, however, dealt with a different section of CAFA. There, the Sixth Circuit held that the plaintiffs could not avoid federal jurisdiction under CAFA by arbitrarily dividing one class action into several class actions, distinguished only by different windows of time, to avoid CAFA's amount-in-controversy threshold while still enabling them to seek damages well in excess of that threshold. *Id.* at 406. Here, Dow contends that the plaintiffs deliberately divided themselves into seven groups of less than 100 to avoid being considered a "mass action" subject to federal jurisdiction under CAFA and that they should not be permitted to do so. Unlike the amount in controversy requirement at issue in *Freeman*, however, Congress explicitly provided that the 100-plaintiff minimum for a "mass action" is *not* satisfied when claims filed by separate plaintiffs are joined by a defendant. 28 U.S.C. § 1332(d)(11)(B)(ii)(II). Dow does not contend that there is a split among the courts of appeals on whether a defendant may join claims to create a CAFA "mass action," a question the statute's text answers unambiguously.

Second, Dow alleges that the Ninth Circuit upset settled law and created a split among the courts of appeals by "finding" that a "mass action" under CAFA "requir[es] an actual trial of 100 plaintiffs." Pet. 19. The opinion below, however, merely quoted the statute, which provides that "claims 'consolidated or coordinated solely for pretrial proceedings'" are not "mass actions" under CAFA. Pet. App. 19a (quoting 28 U.S.C. § 1332(d)(11)(B)(ii)(IV)). The Ninth Circuit did not interpret or apply that language and had no occasion to do so, as CAFA's pretrial-consolidation clause is not at issue in this case. The opinion's brief reference to this aspect of CAFA's definition of "mass action" is, at most, dictum and has no bearing on the outcome of this case.

STATEMENT

A. The Class Action Fairness Act

CAFA was passed to address Congress's concerns about important interstate class actions being decided in state court and about class-action abuse. Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2, 119 Stat. 4, 4–5 (2005). To alleviate the problem of large class actions being decided in state court, CAFA provides that, subject to a number of exceptions, federal courts have jurisdiction over class actions in which the amount in controversy exceeds $5 million and at least one class member and one defendant are diverse. 28 U.S.C. § 1332(d)(2). CAFA also provides that "mass actions" are to be deemed removable class actions, provided that the actions meet the same criteria, such as the diversity and amount in controversy requirements. 28 U.S.C. § 1332(d)(11)(A).

Congress made it more difficult to remove "mass actions" than class actions by imposing additional requirements. In addition to meeting the class action requirements for removal, "mass actions" must include claims of at least 100 plaintiffs whose claims involve common questions of law and fact, and those plaintiffs' claims must meet the usual $75,000 amount in controversy requirement for any suit brought in federal court based on diversity jurisdiction.[1] 28 U.S.C. § 1332(d)(11)(B)(i). Congress further limited "mass actions" by excluding four types of actions that would otherwise qualify as removable "mass actions." Removable "mass actions" do *not* include actions in which "(I) all of the claims in the action arise from an event . . . in the State in which the action was filed, and that allegedly resulted in injuries in that State or in" contiguous states; "(II) *the claims are joined upon motion of a defendant*; (III) all of the claims in the action are asserted on behalf of the general public . . . pursuant to a State statute specifically authorizing such action"; and "(IV) the claims have been consolidated or coordinated solely for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii) (emphasis added).

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[1]The courts of appeals have struggled with the application of the two "mass action" amount in controversy requirements—the $5 million threshold for removable class actions and the $75,000 minimum for everyday diversity jurisdiction. *See, e.g., Lowery v. Ala. Power Co.*, 483 F.3d 1184, 1203–05 (11th Cir. 2007); *Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 681, 686–90 (9th Cir. 2006). The amount in controversy requirements are not at issue here, as neither the court of appeals nor the district court addressed the question.

B. Facts and Proceedings Below

Respondents are seven groups of West African men who worked on banana and pineapple plantations in the Ivory Coast. They suffer from infertility, sterility, and other severe health problems caused by exposure to a Dow pesticide containing 1,2-dibromo-3-chloropropane (DBCP). The workers, who lived on the plantations, breathed DBCP-contaminated air and drank and bathed in DBCP-laced water. E.R. 21.[2] Dow knew as early as the 1950s that DBCP caused sterility in men and was "the most potent testicular toxin known to science." Pet. App. 11a n.1. Nevertheless, Dow continued to manufacture, sell, and export DBCP pesticides. *Id.* By the mid-1970s, undeniable evidence showed that DBCP exposure leads to sterility. In fact, up to 55 percent of men working at DBCP manufacturing facilities in the United States were found to be sterile or infertile. E.R. 51. In 1979, the EPA banned the use of DBCP products in the United States, but Dow continued to export DBCP pesticides to the developing world, including to plantations in the Ivory Coast until at least 1986. Pet. App. 11a n.1.

Seven different groups of Ivory Coast plantation workers each brought suit against Dow and others in California state court. Each suit included fewer than 100 plaintiffs. Dow filed a notice of removal to federal court, contending that the seven separate actions should be treated as a single "mass action" removable to federal court under CAFA. The district court remanded the

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[2]References to the Appellant's Excerpts of Record in the Ninth Circuit are denoted herein as "E.R. ___."

actions to state court *sua sponte*, reasoning that CAFA specifically excludes claims that have been joined by the defendant from the definition of removable "mass actions." *Id.* at 13a. On appeal, the Ninth Circuit vacated the district court's remand orders because the district court lacked the authority to remand *sua sponte*. Subsequently, the plaintiffs filed a motion to remand, arguing that claims joined by a defendant are not "mass actions" under CAFA and that Dow failed to demonstrate that the plaintiffs met the amount in controversy requirement. The district court granted the motion to remand, reasoning again that claims joined by a defendant are not "mass actions" under CAFA. *Id.* at 38a. Dow sought leave to appeal the remand orders. The Ninth Circuit granted leave to appeal and affirmed the district court.

In the Ninth Circuit, Dow relied heavily on *Freeman*, contending that the Sixth Circuit had held that plaintiffs cannot structure their suits to avoid federal jurisdiction under CAFA. Because, according to Dow, the plaintiffs here strategically divided themselves into seven suits to avoid the 100-plaintiff minimum for removable "mass actions," following *Freeman* would require the court to treat the seven smaller suits here as one large "mass action." The court, however, rejected Dow's characterization of *Freeman*, noting that the Sixth Circuit had "specifically 'limited [its holding] to the situation where there is no colorable basis for dividing up the sought-for relief *into separate time periods*, other than to frustrate CAFA.'" *Id.* at 24a (quoting *Freeman*, 551 F.3d at 409) (emphasis and alterations added by Ninth Circuit). Not only was *Freeman*'s holding narrow, the court stated, but the case did not involve the "mass action" provision of

CAFA at issue here. The court concluded that *Freeman*'s holding and rationale were inapposite.

The court of appeals found that the unambiguous language of CAFA—which provides that the definition of "mass action" does not include actions in which "the claims are joined upon motion of a defendant," 28 U.S.C. § 1332(d)(11)(B)(ii)(II)—dictated the result here: Because the suits do not meet the 100-plaintiff jurisdictional minimum for a removable "mass action" under CAFA, Dow, the defendant, cannot join the claims to meet that minimum. The court explained that its holding was consistent with congressional intent to provide some exceptions to "mass action" removal, as demonstrated by the other limitations Congress had placed on "mass actions," including the provision excluding claims "consolidated or coordinated solely for pretrial proceedings." 28 U.S.C. § 1332(d)(11)(B)(ii)(IV).

REASONS FOR DENYING THE WRIT

I. There Is No Circuit Split on the Question Whether Claims May Be Joined by a Defendant to Meet the 100-Plaintiff Requirement for Removal Under CAFA.

The decision below holds that because Dow, a defendant, sought to join the plaintiffs' claims in one action and CAFA explicitly states that claims joined by a defendant are not removable "mass actions" under CAFA, the plaintiffs' seven separate actions are not a removable "mass action." Dow has cited no other court of appeals case applying this exclusion, and there is none. In short, there is no relevant circuit split on Dow's first question presented.

Dow does not dispute that it seeks to join the plaintiffs' claims to meet the 100-plaintiff threshold for a "mass action," and that defendant-initiated joinder precludes removal under the unambiguous terms of § 1332(d)(11)(B)(ii)(II). Rather, Dow contends that the court below ought to have disregarded the statutory language and that, by not doing so, it created a conflict with the Sixth Circuit's holding in *Freeman*.

In *Freeman*, class-action plaintiffs divided their state-court water-pollution nuisance suit into five separate actions, each covering a different six-month period and each seeking damages just under the $5 million jurisdictional threshold. 551 F.3d at 406. The plaintiffs and defendants in each suit were identical, and the defendants removed the case to federal court under CAFA. *Id.* Holding that CAFA provided federal jurisdiction over the aggregated cases, the Sixth Circuit explained that, although plaintiffs may generally seek to avoid removal by seeking less than the CAFA thresholds, "where recovery is expanded, rather than limited, by virtue of splintering of lawsuits for no colorable reason, the total of such splintered lawsuits may be aggregated." *Id.* at 409. The Sixth Circuit was primarily motivated by the fact that, by dividing the suit, each plaintiff could multiply his or her potential recovery without being subjected to federal jurisdiction.

The Sixth Circuit explicitly limited its holding to instances in which claims alleged by an identical class are arbitrarily divided by time period. *Id.* Dow, however, contends that *Freeman* stands for the broad proposition that plaintiffs can never make strategic decisions to structure their suits to avoid federal jurisdiction under

CAFA. That reading is squarely contrary to the Sixth Circuit's recognition that plaintiffs may—and often do—make sacrifices to avoid federal jurisdiction. *Id.* The Sixth Circuit even noted that, in some circumstances, it may be appropriate to divide nuisance class actions by time period. *Id.* at 408.[3]

Nothing in *Freeman* conflicts with the decision below, and there is no reason to believe that the Sixth Circuit would have decided this case differently. First, CAFA does not address whether a series of class-action suits brought by an identical plaintiff class against identical defendants alleging virtually identical claims distinguished only by the time periods at issue may be treated as one suit for the purposes of federal jurisdiction under the statute. Because of that silence, *Freeman* looked to CAFA's overall purpose and legislative history, which indicate that Congress was concerned with class-action lawyers "gaming" the system, particularly in interstate or national class actions. *Id.* at 407–08.[4]

In contrast, Congress explicitly spoke to the situation presented here. CAFA states that "mass actions" do *not*

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[3]The only other case Dow cites that rejects plaintiffs' structuring of a case is an unpublished district court opinion that also dealt with a plaintiff class that divided its suit by time period to avoid the amount in controversy threshold. *See Proffitt v. Abbott Labs.*, 2008 WL 4401367 (E.D. Tenn. Sept. 23, 2008).

[4]The Sixth Circuit may also have been influenced by the fact that the plaintiff class had previously brought suit making the same allegations with regard to yet a different time period. *Freeman*, 551 F.3d at 406. The plaintiff class had prevailed in that suit, winning an aggregate award of $2 million. *Id.*

include "claims that are joined upon motion of a defendant." 28 U.S.C. § 1332(d)(11)(B)(ii)(II). In denying defendants the ability to challenge plaintiffs' decision not to bring a single larger suit, Congress expressed an unambiguous intent to preserve those plaintiffs' decision to bring multiple suits of fewer than 100 plaintiffs, even if the plaintiffs could have joined together in one suit that would have been subject to CAFA removal jurisdiction. The joinder-by-defendant exception is one of several exceptions to federal jurisdiction over class and mass actions outlined by Congress in the statute. Other exceptions include the home-state exception, 28 U.S.C. § 1332(d)(3)–(4), cases involving securities claims, 28 U.S.C. § 1332(d)(9), and cases asserted on behalf of the general public, 28 U.S.C. § 1332(d)(11)(B)(ii)(III). Dow's interpretation of the Sixth Circuit's holding in *Freeman*, and the holding Dow urges in this case, is that these clauses are to be disregarded if plaintiffs structure their suit or suits to take advantage of them. Such an interpretation nullifies the exceptions that Congress has written into the statute.

Furthermore, many of the policy concerns evident in *Freeman* are not present here. *Freeman* concerned the same class of plaintiffs structuring their suits to avoid federal jurisdiction over class claims in excess of $5 million, while still seeking nearly $25 million in damages. *Freeman*, 551 F.3d at 409. Here, each suit was brought by a unique group of plaintiffs, each of whom seeks to recover one time in his one lawsuit.[5]

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[5]Dow complains of "copycat" lawsuits seeking damages for the devastating effect of DBCP on plantation workers. Those suits

(continued...)

Although not cited by Dow, the First Circuit has also recently decided a case involving allegations that a plaintiff class impermissibly structured its suit to avoid federal jurisdiction under CAFA. *See Grimsdale v. Kash N' Karry Food Stores, Inc.*, 564 F.3d 75 (1st Cir. 2009). In *Grimsdale*, a class defined to include only Florida citizens brought suit against a Florida corporation in Florida state court. *Id.* at 76. Kash N' Karry, the defendant corporation, removed the case to federal court in Florida, and the case was transferred to Maine to be consolidated with twenty-four other class-action suits alleging similar wrongdoing against Kash N' Karry. *Id.* at 77. The *Grimsdale* class moved to remand its suit to state court under CAFA's home-state exception, which provides that suits primarily involving plaintiffs and defendants from the same state are not subject to removal to federal court, even if they otherwise meet the requirements for federal jurisdiction. *Id.*; *see* 28 U.S.C. § 1332(d)(4). That motion was granted, and the First Circuit affirmed. *Grimsdale*, 564 F.3d at 77, 81.

Like Dow here, Kash N' Karry argued that the plaintiffs were structuring their complaint to frustrate CAFA's purpose and avoid federal jurisdiction. *Id.* at 79–80. Rejecting Kash N' Karry's argument, the First Circuit discussed both this case and *Freeman*, explaining that the analysis of a claim of evasion of congressional intent "will turn on the precise language of that section of

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[5](...continued)
were brought by workers in a different part of the world (Central America). *See Obregon v. Dole Food Co., Inc.*, 2009 WL 689899 (C.D. Cal. Mar. 9, 2009).

CAFA. Our job is to effectuate the intent expressed in the plain language Congress has chosen, not to effectuate purported policy choices regardless of language." *Id.* at 80. In other words, just as the Ninth Circuit did, the First Circuit harmonized this case and *Freeman* on the basis of the plain language of the statute.

As in *Grimsdale*, the statutory language at issue here is unambiguous, and Dow does not argue otherwise. Indeed, Dow fails to explain how its argument is consistent with CAFA's joinder-by-defendant provision. *See Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect."). Because "the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that [should] be the end of [the] analysis." *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81, 93 (2007); *see Grimsdale*, 564 F.3d at 79 n.4, 80.

II. The Ninth Circuit Made No Holding Regarding Joinder for Pretrial Purposes.

Dow contends that the Ninth Circuit held that "mass action" jurisdiction requires that at least 100 plaintiffs will be parties to "an actual trial" and that the court's "holding" is contrary to the holdings of other courts. The court of appeals, however, held no such thing because this case presents no such issue.

In discussing CAFA's structure, the opinion below quotes other exceptions to federal removal jurisdiction over "mass actions," including the clause providing that suits in which "the claims have been consolidated or coordinated solely for pretrial proceedings" are not

removable "mass actions." 28 U.S.C. § 1332(d)(11)(B)(ii)(IV); Pet. App. 19a. The opinion then paraphrases the text of the statute. On this one sentence—in a discussion that comes *after* the court has stated its holding—Dow builds an argument that certiorari should be granted on its second question presented. The Ninth Circuit, however, used the exception only to illustrate the point that Congress placed a number of restrictions on removability of "mass actions" that it did not place on class actions, including both the joinder-by-defendant and pretrial-consolidation exceptions. The pretrial-consolidation exception to CAFA jurisdiction over "mass actions" is not presented by this case.

Dow also avers that the Ninth Circuit incorrectly concluded that Congress intended to place greater limitations on the removability of "mass actions" than on class actions. Dow's position, however, is belied by the additional requirements that CAFA places on "mass actions," but not on class actions, to qualify as removable and the additional exceptions to removability provided exclusively for "mass actions." For example, Congress requires plaintiffs in "mass actions" to individually meet the $75,000 amount in controversy requirement in addition to the CAFA $5 million threshold, which class plaintiffs need not do. 28 U.S.C. § 1332(d)(11)(B)(i). In addition to the joinder-by-defendant and pretrial-consolidation exclusions already mentioned, Congress also excludes suits that are otherwise removable "mass actions" if the event occurred in the state where the suit is filed and the injuries were suffered in that or contiguous states. 28 U.S.C. § 1332(d)(11)(B)(ii)(I). Although both mass and class actions may take advantage of the home-state exception,

only "mass actions" are entitled to this additional location exception. Given the number of requirements and exceptions involving "mass actions" in the text of the statute, the Ninth Circuit's conclusion that Congress intended to place more limitations on the removal of "mass actions" than class actions is unsurprising.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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(3)

No. 08-1589

In the
Supreme Court of the United States

THE DOW CHEMICAL COMPANY,

Petitioner,

v.

AKA RAYMOND TANOH, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* CENTERPOINT ENERGY, INC., ELI LILLY & COMPANY, EXXONMOBIL CORPORATION, GENERAL ELECTRIC CO., THE NATIONAL ASSOCIATION OF MANUFACTURERS, OCCIDENTAL PETROLEUM CORP., OWENS-ILLINOIS INC., AND SHELL OIL COMPANY SUPPORTING PETITIONER

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CenterPoint Energy, Inc., Eli Lilly & Company, ExxonMobil Corporation, General Electric Co., The National Association of Manufacturers, Occidental Petroleum Corp., Owens-Illinois Inc., and Shell Oil Company respectfully move for leave to file the attached brief of *amici curiae* in this case. Petitioner has consented to the filing of this *amicus* brief, but respondents have withheld consent.

This case concerns the evasion of federal jurisdiction under the Class Action Fairness Act of 2005 ("CAFA") by plaintiffs who have gerrymandered their common claims of law and fact into separate, identical complaints. That sort of procedural gamesmanship is precisely what CAFA was enacted to prohibit. The Ninth Circuit's decision to permit such maneuvers not only conflicts with the text, purpose, and history of CAFA – as well as published decisions of the Sixth, Seventh, and Eleventh Circuits – but has also effectively created a "CAFA-free" zone in the Ninth Circuit that can only serve as a litigation magnet.

Given the inherent dynamics of mass action litigation, the impact of the Ninth Circuit's decision and resulting circuit conflicts will be felt well beyond the immediate context and industry. The Ninth Circuit has provided plaintiffs' attorneys with a guide to keep large tort actions in state court, thereby relieving them of the duties that Congress intended to apply to such actions under CAFA. The Ninth Circuit has therefore sanctioned the very kind of evasive pleading that CAFA was intended to remedy.

Amici together employ over 500,000 workers and generate over $1 trillion in U.S. revenue annually. In addition, the National Association of Manufacturers is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. *Amici* thus have a strong interest in this Court's resolution of the important issues presented in this case. As one would expect, a long line of large mass actions with interstate, national, and international significance is already forming in Ninth Circuit state courts. Absent this Court's resolution of the conflicts and reversal of the Ninth Circuit's decision, the forum-shopping spree will continue unabated. Indeed, the Ninth Circuit's decision affects any entity with minimum contacts in the Ninth Circuit – which of course includes California, one of the largest economies in the world.

As companies that conduct business in those jurisdictions and expend substantial money defending mass action lawsuits, *amici* have a distinct perspective on the importance of the proper interpretation of CAFA's jurisdictional rules, as well as a strong interest in ensuring their consistent and evenhanded interpretation. *Amici* write in the hope that their practical perspective may be of assistance to the Court.

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QUESTIONS PRESENTED

1. The Class Action Fairness Act of 2005 ("CAFA") permits removal of mass actions "in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact" if those common claims "otherwise meet[ ] the provisions" concerning federal jurisdiction over class actions. 28 U.S.C. § 1332(d)(11)(A)-(B)(i). In light of CAFA's objective to expand federal jurisdiction over such mass actions, can removal be evaded by intentionally dividing a mass action that otherwise meets those requirements into multiple, identical cases, each with less than 100 plaintiffs?

2. Does CAFA require a removing party to demonstrate that at least 100 plaintiffs will be parties to an actual trial of the removed action, or is removal determined at the time of filing, based on the aggregate number of plaintiffs identified in claims involving common questions of law or fact?

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INTEREST OF *AMICI CURIAE*[1]

The petition seeks review of an erroneous Ninth Circuit decision that allows plaintiffs to circumvent federal jurisdiction over large civil actions under the Class Action Fairness Act of 2005 ("CAFA") through evasive pleading. The impact of that decision, which interprets a threshold jurisdictional provision and has created a serious conflict among the courts of appeals, will impact any entity that conducts business in the Ninth Circuit – home to one of the largest economies (California) in the world.

All *amici* have a substantial business presence in the jurisdictions covered by the Ninth Circuit, and ties to companies and customers within those jurisdictions. Each year, *amici* expend substantial resources defending mass action lawsuits. Hence, *amici* have a distinct perspective on the importance of the proper interpretation of CAFA's jurisdictional rules, as well as a strong interest in ensuring that the congressional directive as to the proper fora for such actions is applied consistently.

CenterPoint Energy, Inc., is a leading electric and natural gas utility with headquarters in Houston, Texas.

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[1] Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that neither party to this case nor their counsel authored this brief in whole or in part, and that no person other than *amici* paid for or made a monetary contribution toward the preparation or submission of this brief.

Eli Lilly & Company is a leading global pharmaceutical company with headquarters in Indianapolis, Indiana.

ExxonMobil Corporation is a leading global energy products and services corporation with headquarters in Irving, Texas.

General Electric Co. is a leading global technology and services company with headquarters in Fairfield, Connecticut.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states.

Occidental Petroleum Corp. is a leading global energy products and services corporation with headquarters in Los Angeles, California.

Owens-Illinois Inc. is a leading global manufacturing company with headquarters in Perrysburg, Ohio.

Shell Oil Company is a leading global energy products and services company with headquarters in Houston Texas.[2]

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[2] Shell Oil Company was a party to the original complaints filed in this petition, but is not a party to the appeal. Shell now joins this brief as *amicus curiae* in support of petitioner.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress enacted the Class Action Fairness Act of 2005 ("CAFA") to address the forum shopping and procedural gamesmanship that have long plagued class actions and mass tort litigation. Since the passage of CAFA, plaintiffs' attorneys have consistently attempted to pursue end-runs around the legislation. When presented with such a stratagem – a class action of 300 or so plaintiffs and $24.5 million in controversy artificially divided into five identical complaints distinguished only by consecutive time intervals – the Sixth Circuit sensibly aggregated the common claims of law and fact and exercised federal jurisdiction under CAFA. When presented with a similarly creative maneuver – a mass action claim on behalf of 664 foreign plaintiffs and at least $49 million in controversy divided alphabetically into seven identical complaints – the Ninth Circuit gave credence to the evasive pleading and refused federal jurisdiction.

In the process, the Ninth Circuit created an additional conflict with the Seventh and Eleventh Circuits, again relying on the artifice of the evasive pleading scheme, by reading CAFA to require that a mass action propose an actual joint trial on the face of its complaint in order to establish federal jurisdiction. Because none of the seven identical complaints explicitly proposed a joint trial, the Ninth Circuit denied federal jurisdiction. By contrast, the Seventh and Eleventh Circuits have looked beyond evasive pleadings or representations to the underlying claims

involving common questions of law or fact in determining whether a joint trial has been proposed for jurisdictional purposes under CAFA.

The Ninth Circuit's error and the resulting conflicts warrant review. The history of class actions and mass tort litigation demonstrates that news travels fast. Once a court creates a favorable loophole for filing, it becomes a magnet for filings from around the country. Indeed, the existence of such anomalous "jackpot" jurisdictions in remote parts of the state-court system was one of the primary reasons why Congress believed that federal jurisdiction needed to be expanded.

The Ninth Circuit, already considered a favorable location for federal class actions, has now given plaintiffs' attorneys a powerful tool – the ability to remain in state court by simply dividing a mass action complaint in any arbitrary fashion as long as each individual filing falls under the CAFA numerical thresholds. Not surprisingly, there has already been a proliferation of copycat claims and pleading schemes as a result of the court of appeals' decision.

Unless the Court corrects that error and resolves these conflicts, companies throughout the United States with minimum long-arm presence in the Ninth Circuit will find themselves defending multiple large mass actions in local state courts, when Congress, with good reason, mandated that they be heard instead in federal court. For those reasons, the

petition should be granted and the judgment of the court of appeals should be reversed.

REASONS FOR GRANTING THE WRIT

A. THE NINTH CIRCUIT DECISION CREATES A CIRCUIT SPLIT WITH THE SIXTH CIRCUIT AND IS INCONSISTENT WITH THE PLAIN TEXT AND PURPOSE OF CAFA.

Congress enacted CAFA to expand federal jurisdiction over class and mass actions and to put an end to the practice of gerrymandering complaints to shop for the most lucrative forum. The Act thus endeavors to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Pub. L. No. 109-2, § 2, 119 Stat. 4, 4-5 (2005).

To accomplish those purposes, CAFA permits the removal of interstate and international class actions involving 100 or more similarly affected plaintiffs, 28 U.S.C. § 1332(d)(5)(B), and an amount in controversy in excess of $5,000,000. 28 U.S.C. § 1332(d)(2). The common claims of the individual plaintiffs "shall be aggregated to determine whether the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs." 28 U.S.C. § 1332(d)(6). Mass action cases that meet these criteria are to be treated as class actions for removal purposes. 28

U.S.C. § 1332(d)(11)(A) ("For purposes of this subsection [subsection 1332(d) concerning application of federal diversity jurisdiction] and section 1453 [class action removal], a mass action shall be deemed to be a class action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those paragraphs.").

As the Senate Committee Report explains, "the overall intent of these provisions is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications." S. Rep. No. 109-14, at 30 (2005), *reprinted in* 2005 U.S. Code Cong. & Admin. News 3, 34. Consequently, the definition of class action is "to be interpreted liberally * * * [and] should not be confined solely to lawsuits that are labeled 'class actions' by the named plaintiff." *Ibid.* "*[L]awsuits that resemble a purported class action should be considered class actions* for the purpose of applying these provisions." *Ibid.* (emphasis added).

Specifically, the Report concluded that mass actions are "simply class actions in disguise," *id.* at 41, "function very much like class actions and are subject to many of the same abuses." *Id.* at 40. It explains that CAFA expanded "federal jurisdiction over mass actions – suits that are brought on behalf of numerous named plaintiffs who claim that their suits present common questions of law or fact that should be tried together even though they do not seek class certification status." *Ibid.*

Before CAFA, lawyers could "'game' the procedural rules and keep nationwide or multi-state actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests." S. Rep. 109-14, at 3. Correspondingly, one of Congress's primary concerns was "[w]hether the class action has been pleaded in a manner that seeks to avoid jurisdiction." *Id.* at 36. Reflecting Congress's intention "that plaintiffs not be able to plead around" the jurisdictional requirements with "creative legal theories," *id.* at 33, even in an action where up to two-thirds of plaintiffs and the primary defendant are citizens of the filing state, if the "*federal court concludes evasive pleading is involved, that factor would favor the exercise of federal jurisdiction.*" *Ibid.*; 28 U.S.C. § 1332(d)(3)(C) (emphasis added).

In this case, where "two-thirds or more of the members of the plaintiffs class or one or more of the primary defendants are not citizens of the state in which the action was filed," and the common claims in aggregate meet the jurisdictional thresholds of section 1332(d)(2)-(10), congressional will is less discretionary. The action "*will* be subject to federal jurisdiction." S. Rep. 109-14, at 30 (emphasis added).

The Ninth Circuit's decision to allow plaintiffs to evade federal jurisdiction by artificially dividing their mass action claim alphabetically by plaintiff into seven identical actions not only undermines CAFA, but has also created a conflict with the Sixth Circuit.

In *Freeman* v. *Blue Ridge Paper Products, Inc.*, 551 F.3d 405, 407 (6th Cir. 2008), the Sixth Circuit followed the congressional mandate to look behind such evasive pleading and decide jurisdictional issues based on the aggregate size and requested relief for all common claims. *Freeman* involved a class action on behalf of almost 300 landowners seeking approximately $24.5 million in damages for nuisance due to water pollution from a paper mill. The plaintiffs' attorney brought the suit in the form of five identical complaints divided into sequential time intervals, each complaint conveniently seeking damages of $4.9 million and $74,000 per individual. *Id.* at 406.

The district court remanded the case. The Sixth Circuit reversed. Noting that "CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction," the court held that since there was "no colorable reason for breaking up the lawsuits in this fashion, other than to avoid federal jurisdiction," the class size and amount in controversy for the five complaints of common, indeed identical, claims of law and fact had to be aggregated for determining whether the § 1332(d) thresholds had been met. *Id.* at 407.

By contrast, the Ninth Circuit rewarded plaintiffs' chicanery. The court permitted the 664 foreign plaintiffs, represented by the same attorney and alleging civil claims amounting in aggregate to at least $49 million, to evade federal jurisdiction by carving the mass action claim alphabetically into seven identical complaints. Pet. App. at 10. Because

each alphabetical grouping technically contained fewer than 100 plaintiffs, the Ninth Circuit determined that none of the complaints constituted a "mass action" as defined in section 1332(d)(11)(B)(i), and could not be joined by motion of the defendant in order to do so under section 1332(d)(11)(B)(ii).[3] That was error.

As in *Freeman*, the action in this petition satisfies the CAFA thresholds when the common "claims" repeated verbatim were considered in aggregate (as is

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[3] Section 1332(d)(11)(B)(i) provides:

> As used in subparagraph (A), the term "mass action" means any civil action * * * in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

Section 1332(d)(11)(B)(ii) provides:

> As used in subparagraph (A), the term "mass action" shall not include any civil action in which – * * * (II) the claims are joined upon motion of a defendant * * * * *"

The Senate Report explains that concerning mass actions, Congress not only sought to address the "same abuses as class actions" but also to prevent joinder of claims "*that have little to do with each other* and confuse a jury into awarding millions of dollars to individuals who have suffered no real injury." S. Rep. 109-14, at 41 (emphasis added). In this case, the Ninth Circuit did not address that language in the legislative history and did not suggest that the seven identical complaints were factually unrelated.

required under section 1332(d)(6)). And like *Freeman*, albeit with less creativity and margin for error (the seven complaints each meet the amount in controversy threshold anyway), there was no basis for the alphabetical grouping save the evasion of federal jurisdiction.

The Ninth Circuit acknowledged that the Sixth Circuit had rejected schematic pleading to avoid CAFA's jurisdictional requirements. But it argued, still relying upon plaintiffs' evasive pleading, that the plaintiffs had chosen not to proceed as a class, and hence the "concerns animating *Freeman* and *Proffitt*[4] simply are not present in this case, as * * * each of the seven state court actions was brought on behalf of a *different* set of plaintiffs, meaning that none of the [alphabetized] plaintiff groups stand to recover in excess of CAFA's $5 million threshold between the seven suits." Pet. App. at 23 (emphasis in original).[5]

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[4] As acknowledged in *Freeman*, a district court in the Sixth Circuit had also rejected an attempt to evade jurisdiction by dividing a class into arbitrary time periods. See *Proffitt* v. *Abbott Labs.*, No. 2:08-cv-151, 2008 WL 4401367, at *5 (E.D. Tenn. Sept. 23, 2008).

[5] The Ninth Circuit also misconstrued *Freeman*, contending that its holding was limited "to the situation where there is no colorable basis for dividing up the sought-for retrospective relief *into separate time periods*, other than to frustrate CAFA." Pet. App. at 29 (emphasis in original) (quoting *Freeman*, 551 F.3d at 409). As is evident from the context of the quoted language, the Sixth Circuit sought only to limit its holding "to the situation *where there is no colorable basis for dividing up* the sought-for

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In so doing, the Ninth Circuit, while paying lip service to CAFA's intent to weed out "copycat" actions, Pet. App. at 20-21, ignored its text, which states that "a mass action shall be deemed to be a class action removable under [section 1332(d)(2)-(10)] if it otherwise meets the provisions of those paragraphs," section 1332(d)(11)(A), as well as its purpose of eradicating claims that appear "to be gerrymandered solely to avoid federal jurisdiction * * * * " S. Rep. 109-14, at 36; see also *supra* note 3. That evasion of congressional will should not stand.

B. THE NINTH CIRCUIT DECISION CREATES A SPLIT WITH THE SEVENTH AND ELEVENTH CIRCUITS.

The overarching theme of the Ninth Circuit's opinion is that plaintiffs can make an end-run around CAFA simply by deciding not to seek certification or explicitly demand a joint trial. Pet. App. at 21 ("none of [the out of circuit cases] addressed CAFA's 'mass action' or 'numerosity' provisions"). The Ninth Circuit thereby ignored not only the text, purpose, and history of section 1332(d)(11)(A),[6]

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retrospective relief into separate time periods, *other than to frustrate* CAFA." *Freeman*, 551 F.3d at 409.

[6] As explained on the Senate floor:

> [I]t is vital that we retain the mass action section of the bill without an amendment ***so that we don't open the door for lawyers to make an end run around what we are trying to do with class***

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but also section 1332(d)(11)(B)(i)-(ii)(II), seeing it as rendering section 1332(d)(2)-(10) jurisdiction "fairly narrow" and mass actions effectively non-removable for claims involving 100 or more plaintiffs carved up artificially. However, the text makes clear that Congress was attempting to address the egregious form of procedural gamesmanship whereby parties arbitrarily combine claims that do not "involve common questions of law or fact." 28 U.S.C. § 1332(d)(11)(B)(i); *supra* note 4.[7]

In contrast to the Ninth Circuit, the Seventh and Eleventh Circuits properly recognize that "any 'mass action' is also considered a 'class action' for the purposes of CAFA's removal provisions." *Lowery* v. *Ala. Power Co.*, 483 F.3d 1184, 1195 (11th Cir. 2007). As the Eleventh Circuit explained, "[i]n extending CAFA to large individual state court cases that are functionally indistinguishable from class actions, the mass action provision prevents plaintiffs' counsel

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actions in this bill. The mass action section was specifically included to prevent plaintiffs' lawyers from making this end run.

51 CONG. REC. S1076-02, S1082 (Feb. 8, 2005) (Statement of Sen. Lott) (emphasis added).

[7] See also 51 CONG. REC. S1076-02, S1082 (Feb. 8, 2005) (Statement of Sen. Lott) (noting that in states that do not provide a class action device "plaintiffs' lawyers often bring together hundreds, sometimes thousands of plaintiffs to try their claims jointly without having to meet the class action requirements, and often the claims of the multiple plaintiffs *have little to do with each other*") (emphasis added).

from avoiding CAFA's expanded federal jurisdiction by simply choosing not to seek class certification." *Lowery*, 483 F.3d at 1198, n.32.[8]

Similarly, in *Bullard* v. *Burlington Northern Santa Fe Railway Co.*, the Seventh Circuit acknowledged that § 1332(d)(11)(A) "defines a class action to *include* a mass action." 535 F.3d 759, 762 (7th Cir. 2008)) (emphasis in original). Accordingly, the "import of the shared class action definition in CAFA's various provisions is that any lawsuit that meets the jurisdictional requirements of a 'mass action' is also a removable 'class action.'" *Lowery*, 483 F.3d at 1195, n.27 ("[U]nder CAFA, a mass action simultaneously *is* a class action (for CAFA's purposes) and *is not* a class action (in the traditional sense of Rule 23 and analogous state law provisions.")) (emphasis in original).

More specifically, there is an irreconcilable conflict among the Seventh, Ninth, and Eleventh Circuits as to whether the language in section 1332(d)(11)(B)(i) referring to mass actions as "claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact" creates a loophole that permits plaintiffs' to evade jurisdiction by not technically

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[8] Although the Eleventh Circuit ultimately remanded in *Lowery* for failure to satisfy CAFA's jurisdictional minimum amount in controversy, the remand did not alter the Court's analysis on this issue.

asking for a common trial over non-certified classes at the removal stage.

The Seventh Circuit correctly rejected that reading of CAFA, viewing it as rendering section 1332(d)(11), which defines class actions to include mass actions, a nullity. *Bullard*, 535 F.3d at 762. Instead, the issue is whether "the *claims* arise out of 'the same transaction or series of transactions' and '*common* questions of law or fact' are present." *Ibid.* (emphasis added) (citations omitted). Thus, in the Seventh Circuit's understanding, section 1332(d)(11)(B)(i) is designed to ensure not that "100 or more plaintiffs answer a roll call in court," but that there is no automatic federal jurisdiction under the mass action provision for claims that are otherwise unrelated and consolidated solely for pretrial purposes. *Ibid.*

In similar fashion, the Eleventh Circuit explained that the "commonality requirement: 'the plaintiffs' claims [must] involve common questions of law and fact,'" is crucial to understanding section 1332(d)(11)(B)(i). *Lowery*, 483 F.3d at 1202. The Seventh and Eleventh Circuits have thus followed Congress's directive to ignore plaintiffs' packaging and focus on the underlying *common claims* of law or fact when aggregating for purposes of jurisdiction under section 1332(d).

By contrast, the Ninth Circuit ignored the qualifying commonality language in CAFA, and again relying upon plaintiffs' evasive pleading, held that as long as plaintiffs do not technically propose a joint

trial of 100 or more plaintiffs in any otherwise common complaint, there is no jurisdiction. Pet. App. at 16 ("CAFA's 'mass action' provision applies only to civil actions in which the 'monetary' relief claims of 100 or more persons are proposed to be tried jointly * * * [b]y its plain terms, § 1332(d)(11) does not apply to plaintiffs' claims in this case as none of the seven state court actions involves the claims of one hundred or more plaintiffs.").

The Ninth Circuit's error is significant, as it allows plaintiffs to avoid federal jurisdiction and remain in state court throughout the entirety of the pretrial period over identical complaints of common law or fact, but yet, assuming a defendant is not forced to settle, would not prohibit a request for consolidation of a joint proceeding immediately before trial. See *Bullard*, 535 F.3d at 762 ("But nothing in § 1332(d)(11) says that the eve of trial is the *only* time when a 'mass action' can be detected.") (emphasis in original).

C. THE CONFLICTS CREATED BY THE NINTH CIRCUIT INVOLVE ISSUES OF EXCEPTIONAL IMPORTANCE WARRANTING THIS COURT'S REVIEW.

There is no need to wait to resolve the conflicts created by the Ninth Circuit's decision. Indeed, given the inherent dynamics of class and mass actions, the Ninth Circuit will now predictably become a magnet for such filings – which means that the split is

unlikely to deepen because more and more of these cases will simply be filed in the Ninth Circuit. Percolation would therefore serve no useful purpose, and only compound the national problems created by the Ninth Circuit's decision.

Those problems are of serious magnitude. Class actions "typically involve more people, more money, and more interstate [and international] commerce ramification than any other type of lawsuit." S. Rep. 109-14, at 4. One need look no further than the pre-CAFA regime – which has now been effectively restored in the Ninth Circuit – to appreciate the significant, practical consequences if the Ninth Circuit's decision stands.

In enacting CAFA, Congress was concerned about the "nonsensical result" of evading federal jurisdiction such that "a citizen can bring a 'federal case' by claiming $75,001 in damages for a simple slip-and-fall case against a party from another state, while a class action involving 25 million people living in all fifty states [or foreign persons] and alleging claims against a manufacturer that are collectively worth $15 billion" were heard in state court. *Id.* at 8.

Further, in Congress's view, state courts may apply governing rules "inconsistently (frequently in a manner that contravenes basis fairness and due process considerations) and * * * [provide] inadequate supervision over litigation procedures and proposed settlements." S. Rep. No. 109-14, at 3. Federal trial courts are often better equipped than state

counterparts to manage the substantial burdens of the sprawling, complex proceedings. See John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J. L. & PUB. POL'Y 143, 151 (2001). Congress did not view this evasion as merely an academic problem. *Ibid.*; see also Lisa Litwiller, *Why Amendments to Rule 23 Are Not Enough: A Case for the Federalization of Class Actions*, 7 CHAP. L. REV. 201, 218 (2004) ("Federal courts are better equipped to handle cases with national implications, and generally are more competent in certifying and managing these cases.").

Once ensconced in state courts, plaintiffs would further shop around for the friendliest county courthouses. See Deborah R. Hensler, *et al.*, CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAINS 15 (1999). That created a phenomenon where certain state courts would experience class action filing rates that were vastly disproportionate to their population. See 25 HARV. J. L. & PUB. POL'Y at 161-63 (noting that the *per capita* rate of state court class action filings in the small, rural county of Madison County, Illinois, was about eight times higher than the federal court systems). Once a particular court or judge was found to be certification-friendly, out-of-county plaintiffs would flock to the area and file duplicative, "copycat" pleadings, see *id.*

at 163-64, as well as expand the local "practice" to other major industries.[9]

The avoidance of plaintiffs' burrowing into local courts with an "I never met a class action I didn't like" approach was one of the main abuses CAFA sought to correct. S. Rep. 109-14, at 18 (citation omitted). The indications are that CAFA is having its intended effect in previously magnetic counties. See Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1609-10 (2008) (noting that class action filings in Madison County totaled 106 in 2003 and 84 in 2004, but dropped to 3 in 2006).

The Ninth Circuit's decision thwarts clear congressional intent to eliminate evasive pleading in the context of class and mass actions and, in the process, turns back the clock on aggressive forum shopping. It ensures that future Madison Counties

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[9] For instance, in Madison County, Illinois, a series of favorable financial service class action decisions eventually attracted cases concerning hotel energy fees against Wyndham Hotels (which had no units in the county); chicken carcass water retention claims against Tyson Foods (predicated upon one couple that bought Tyson chicken from the local store); and breach of insurance company fee arrangement claims against Blue Cross-Blue Shield (based on one doctor's agreement with that company). See John Beisner & Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, 4 CLASS ACTION LITIG. REP. (BNA) 58 (Jan. 24, 2003). From 1998 to 2000, class action filings increased over 1800% and over 80% of the county docket consisted of class actions.

will be located within this jurisdiction. Already one of the most favorable federal jurisdictions for class certifications, see John C. Coffee Jr. & Stefan Paulovic, *Class Certification: Developments over the Last Five Years 2002-2007*, 8 CLASS ACTION LITIG. REP. (BNA) S-787, S-819 (Oct. 26, 2007), the Ninth Circuit has now given plaintiffs another inviting option – remaining in state court as long as each arbitrarily divided complaint mathematically falls just under CAFA's thresholds. 28 U.S.C. § 1332(d)(11)(A). The evidence suggests that plaintiffs have already begun accepting the Ninth Circuit's invitation. See, e.g., *Vanegas* v. *Dole Food Co.*, No. CV 09-181-CAS (VBKx), 2009 WL 213012, at *1 (C.D. Cal. Jan. 29, 2009) (citing this case and remanding action on behalf of foreign banana plantation workers against several companies where plaintiffs divided mass action alphabetically such that each case has less than 100 plaintiffs); see also *Obregon* v. *Dole Food Co.*, No. CV 09-186-CAS (VBKx), 2009 WL 689899, at *4 (C.D. Cal. Mar. 9, 2009) (same).

Review is further warranted because jurisdiction is a crucial element of class actions and mass tort litigation. The sheer size and breadth of most class actions bring to bear an inordinate pressure upon defendants to settle. See, e.g., *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 559 (2007) ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching [summary judgment or trial] proceedings."), *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta*, 552 U.S. 148, 159

(2008) ("[E]xtensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies."); see also George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Actions*, 26 J. LEGAL STUD. 521 (1997) ("Class certification in a mass tort case confers extraordinary negotiating power even where the underlying claim is meritless * * * * The power is so extreme that all mass tort claims certified as classes appear to settle, rather than litigate to judgment."). Accordingly, in response to the inundation of mass tort cases in the 1970s and 1980s, courts began to entertain extraordinary procedural remedies to counter the tactical imbalance. As the Seventh Circuit noted in granting mandamus relief to defendants' challenge of a district court certification of 120,000 plaintiffs in a high-profile exposure case:

> The plaintiffs' able counsel argues that we need not intervene now, that it will be time enough to intervene * * * when a final judgment is entered * * * * [That] will come too late to provide effective relief to the defendants * * * [because of] the sheer *magnitude* of the risk to which the class action, in contrast to the individual actions pending or likely, exposes them * * * * It is true that [class certification] would only be prima facie liability, that the defendants would have various defenses. But they could not be confident that the defenses would prevail. They might, therefore, easily be facing $25 billion in potential liability (conceivably

> more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.

In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1297-98 (7th Cir. 1995) (internal quotations and citations omitted); see also *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) ("The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low * * * * These settlements have been referred to as judicial blackmail.") (citation omitted).

Congress considered that hydraulic settlement pressure, particularly prevalent in magnet state court jurisdictions, as one of the primary reasons why federal jurisdiction needed to be expanded in CAFA. See S. Rep. 109-14, at 16 (2005) ("Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly * * * [that] can essentially force corporate defendants to pay ransom to class attorneys by settling – rather than litigating – frivolous lawsuits.").

The conflicts created by the Ninth Circuit concern a threshold jurisdictional provision, and thus reverberate well beyond the immediate context and industry. Each year, businesses expend substantial money to defend against the filing and even the

threat of class actions.[10] Those costs, which could otherwise be used to expand business, create jobs, and develop new products, instead are passed on to consumers or absorbed as a loss to the company. In some cases, a company will be forced out of business because of expensive litigation. That is certainly not to say that all class actions are frivolous. It is to say that fidelity to the congressional mandate as to the proper forum for such actions is critical to accomplish Congress's objectives of legal and economic certainty and avoiding the risk that lengthy and expensive efforts in one judicial system or the other will be wasted.

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[10] Because of the settlement pressure identified above, many lawsuits do not result in reported decisions or adequate records of class action costs, particularly in state courts. Thus, even extensive studies like those conducted by notable institutes like the RAND Corporation have had difficulty quantifying the volume of class and mass action suits and related expenditures with specificity. See Deborah Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 DUKE J. COMP. & INT'L L. 179, 184 (2001). A major international insurance firm study has concluded that the total cost of all U.S. tort litigation, of which class and mass actions comprise a substantial portion, was $252 billion (or 1.83% of U.S. GDP) in 2007, compared with $260.3 billion (2.23%) and $261.4 billion (2.10%) in 2004 and 2005, respectively. See Tillinghast Towers Perrin, 2008 Update on U.S. Tort Cost Trends, available at http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2008/200811/2008_tort_costs_trends.pdf.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

THE DOW CHEMICAL COMPANY,
Petitioner,

v.

AKA RAYMOND TANOH, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN CHEMISTRY COUNCIL FOR LEAVE TO FILE AND BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

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MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN CHEMISTRY COUNCIL FOR LEAVE TO FILE A BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") and The American Chemistry Council ("ACC") hereby move this Court, pursuant to Rule 37.2, for leave to file the attached brief *amici curiae* in support of petitioner in this case. While the petitioner has consented to the filing of this brief, respondents Aka Raymond Tanoh, *et al.*, have not consented. Correspondence reflecting

the consent of the petitioner has been lodged with the Clerk.

The Chamber is the world's largest business federation, with an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber is well positioned to assist the Court in its evaluation of the parties' arguments because the Chamber regularly advances the interests of its members in courts throughout the country on issues of critical concern to the business community, and has participated as amicus curiae in numerous cases addressing jurisdictional issues, including, for example, *Hertz v. Friend*, No. 08-1107 (cert. granted June 8, 2009).

The ACC represents the leading companies engaged in the business of chemistry. The business of chemistry – a $689 billion enterprise – is a key element of the nation's economy, accounting for ten cents of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The Chamber's members and the firms represented by the ACC are frequently defendants in individual cases and class actions in which the existence of federal diversity jurisdiction is at issue. In addition, the Chamber was involved – on behalf of its members – in organizing support for the much-needed class action reforms reflected in the Class Action Fairness Act of 2005 ("CAFA"). As a result, the organization has a wealth of experience in

interpreting the jurisdictional requirements set forth in CAFA and is uniquely suited to provide the Court with significant guidance in addressing the policy goals and intent of the legislation – an issue not addressed in detail in the parties' briefs that might otherwise escape the Court's attention.

The Chamber and the ACC have a strong interest in seeking review of the Ninth Circuit's March 27, 2009 opinion, which both eroded federal jurisdiction under CAFA by applying a presumption against removal and invited gamesmanship by eliminating federal jurisdiction over mass actions as long as such actions are filed piecemeal in state courts. The Ninth Circuit's opinion, if left undisturbed, will significantly restrict the ability of defendants to remove mass actions to federal court – in direct contravention of their constitutional and statutory rights. The Ninth Circuit's opinion will also blunt the effectiveness of CAFA, wherein Congress specifically provided for expanded federal jurisdiction over, and relaxed the impediments to removal of, certain interstate class actions and mass actions. The Ninth Circuit's decision will have far-reaching effects on companies that do business in the United States, many of which are members of the Chamber and/or represented by the ACC, by denying them the ability to avail themselves of diversity jurisdiction.

For the foregoing reasons, the motion of the Chamber and the ACC to file a brief *amici curiae* in support of petitioner should be granted.

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE AMERICAN CHEMISTRY COUNCIL *AMICI CURIAE* IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") and The American Chemistry Council ("ACC") respectfully submit this brief *amici curiae* in support of the petition for a writ of certiorari in this case.[1]

INTERESTS OF AMICI CURIAE

The interests of *amici curiae* are set forth in the foregoing Motion for Leave to File.

QUESTIONS PRESENTED

This brief addresses the following questions presented in the petition for a writ of certiorari:

1. Does the Ninth Circuit's opinion contravene Congress's desire, as reflected in the Class Action Fairness Act, to greatly expand diversity jurisdiction over mass actions?

2. Does the Ninth Circuit's opinion improperly promote jurisdictional gamesmanship in contravention of the Class Action Fairness Act?

SUMMARY OF THE ARGUMENT

Approximately four-and-a-half years ago, our nation took a critical step toward ending class action

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part. No party or its counsel, nor any other person or entity other than the Chamber and its members and the ACC, made a monetary contribution intended to fund the preparation or submission of this brief.

abuse with the enactment of the Class Action Fairness Act of 2005 ("CAFA"). The decade preceding CAFA's passage had seen an exponential increase in the number of class actions brought in the United States, as plaintiffs' attorneys exploited a loophole in federal diversity jurisdiction to bring interstate class actions involving tens or even hundreds of millions of dollars in certain state courts that came to be known as "magnet jurisdictions." S. Rep. No. 109-14, at 13 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 13-14. These magnet jurisdictions engaged in numerous abusive practices, such as certifying class actions on an *ex parte* basis and approving class settlements in which plaintiffs' attorneys received millions of dollars in fees while class members received coupons of little – if any – value. *Id.* at 13-23. CAFA ended many of these abusive practices by creating federal jurisdiction over most large interstate class actions or "mass actions" and setting standards for coupon settlements. The results have been dramatic: the so-called class action "magnet jurisdictions" have seen a marked drop in class action activity, and reports of class action abuse are waning.

The Ninth Circuit's decision here threatens to undo these advances by eliminating federal jurisdiction over mass actions as long as such actions are filed piecemeal in state courts. In this case, 664 plaintiffs have filed seven separate (though identical) complaints in state court in California – all seeking damages based on the allegation that each was exposed to a Dow product containing 1,2-dibromo-3-chloropropane. The plaintiffs filed all of their claims

on the same date and in the same court – Los Angeles Superior Court – presumably with the intent that the state court would ultimately treat all of the claims as a unitary group. Plaintiffs thus created the functional equivalent of a mass action in California state court. But the collective action at issue here is precisely the type of mass action for which Congress intended to create federal jurisdiction under CAFA. Had the Respondents filed the collective action as a single, 664-plaintiff action, there can be little doubt that Petitioner could have successfully removed this case to federal court. Nonetheless, the Ninth Circuit held that the mere fact that plaintiffs' counsel divided this collective action – which involves numerous counts brought by nearly seven hundred foreign nationals – into seven separate suits of less than one hundred plaintiffs each rendered removal improper. If the Ninth Circuit's decision is left undisturbed, the plaintiffs' bar will have a tool for rendering CAFA's mass action provision inert – simply divide any collective action into separate suits of less than one hundred plaintiffs and the federal courthouse door is slammed shut.

That result is directly contrary to the goals of Congress in enacting CAFA and to the Sixth Circuit's finding that parties cannot splinter suits to evade federal jurisdiction. Certiorari should be granted and the ruling reversed.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision merits review because it is directly at odds with Congress's intent in enacting CAFA – to expand federal diversity juris-

diction to cases with a clear impact on interstate commerce and to end the gamesmanship and manipulative pleading tactics that kept many such actions in state court. Contrary to this intent, the Ninth Circuit eroded federal jurisdiction by applying a presumption against removal, and it invited gamesmanship by eliminating federal jurisdiction over mass actions as long as such actions are filed piecemeal in state courts. In so doing, it elevated form over substance and failed to accept this case for what it obviously is – the functional equivalent of a mass action. It also created a conflict with the Sixth Circuit's proper holding that parties should not be allowed to "splinter . . . lawsuits solely to avoid federal jurisdiction." *Freeman* v. *Blue Ridge Paper Products, Inc.*, 551 F.3d 405, 408 (6th Cir. 2008).

The Court should grant review to correct the Ninth Circuit's error and to prevent the wholesale subversion of CAFA's mass action provision.

I. THE NINTH CIRCUIT'S RULING UNDERMINES CONGRESS'S INTENT TO EXPAND FEDERAL JURISDICTION OVER MASS ACTIONS.

The Ninth Circuit's cramped reading of CAFA reflected an improper presumption against removal that has no place in the mass action context. In affirming remand, the Ninth Circuit ratified the district court's express holding that, "[a]s a general matter, '[t]he removal statute is strictly construed against removal jurisdiction and any doubt must be resolved in favor of remand.'" Pet. App. 38 (quoting *Hofler* v. *Aetna U.S. Healthcare of Cal., Inc.*, 296

F.3d 764, 767 (9th Cir. 2002)). Such hostility to the expansive jurisdictional principles codified in CAFA is plainly erroneous. Under traditional principles of statutory interpretation, the CAFA-specific removal statute, 28 U.S.C. § 1453, actually requires the opposite presumption – that CAFA's terms should be interpreted and applied broadly and that any doubts about whether removal is appropriate should be resolved in favor of removal. And as applied in this case, removal was proper under § 1453.

The presumption against removal to which the lower courts referred derives from 28 U.S.C. § 1441, the removal rule that applies to traditional diversity cases. *See Hofler*, 296 F.3d at 767-68 (analyzing removal under § 1441). The interpretive canon mandating "strict construction" of removal jurisdiction under § 1441 reflects this Court's analysis in *Shamrock Oil Corp. v. Sheets*, 313 U.S. 100 (1941) and *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283 (1938), of Congressional intent in enacting and amending that particular statute. In those cases, the Court examined the context surrounding the statute and concluded that Congress meant for it to be construed narrowly. *See Shamrock Oil*, 313 U.S. at 108 ("Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation."); *St. Paul Mercury*, 303 U.S. at 288 ("The intent of Congress drastically to restrict federal jurisdiction in contro-

versies between citizens of different states has always been rigorously enforced by the courts.").

Notably, on other occasions, the Court has indicated that, had Congress been motivated by a different, more expansive purpose, the interpretive canon it adopted might have been different. *See Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697 (2003) (noting that construction of removal statute is influenced by later Congressional enactments evidencing different Congressional policy regarding removal). *Cf. Shamrock Oil*, 313 U.S. at 106 (observing that an earlier removal statute had greatly liberalized removal practice).[2]

The very same principles of statutory construction that led the Supreme Court to employ a presumption in favor of remand when applying § 1441 compel the opposite result here. To begin, the text of CAFA explicitly states that the purpose of enacting the statute was to address the problem of state and local courts "keeping cases of national importance

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[2] This approach – *i.e.*, interpreting a statute consistent with legislative intent – is fundamental to statutory interpretation. *United States v. N.E. Rosenblum Truck Lines, Inc.*, 315 U.S. 50, 53 (1942) ("The question here, as in any problem of statutory construction, is the intention of the enacting body."); *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 542 (1940) ("In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress."); *see also Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (noting that canons of statutory construction are merely guides "designed to help judges determine the Legislature's intent as embodied in particular statutory language").

out of Federal court" and to develop a jurisdictional regime that would "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction." Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 2(a)(4)(A), 2(b)(2), 119 Stat. 4 (2005). Thus, Congress explicitly stated in CAFA that the statute's purpose was to broaden (not limit) federal jurisdiction.

The legislative history confirms Congressional intent that the entire statute, including § 1453, be construed broadly.[3] In a colloquy that took place on the House floor moments before passage of CAFA, one of the bill's key sponsors, then-House Judiciary Committee chairman F. James Sensenbrenner, stated: "[t]he bottom line is that [CAFA] is intended to substantially expand Federal court jurisdiction over class actions" and its provisions "should be read broadly, with a strong preference that interstate class actions should be heard in a Federal court if properly removed by a defendant." 151 Cong. Rec. H723, 730 (daily ed. Feb. 17, 2005).[4] Likewise, ac-

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[3] As other courts have recognized, CAFA's legislative history is probative on the question of how ambiguity in CAFA's provisions should be interpreted. *See Amalgamated Transit Union Local 1309 v. Laidlaw Transit Servs., Inc.*, 448 F.3d 1092, 1093 (9th Cir. 2006) (noting in the context of construing 28 U.S.C. § 1453(c) that "when we interpret a statute, our purpose is always to discern the intent of Congress") (quotations omitted).

[4] This colloquy among key House sponsors of the legislation is entitled to particular deference because it reflects

cording to the Senate Report, "[t]he Committee believes that the federal courts are the appropriate forum to decide most interstate class actions because these cases usually involve large amounts of money and many plaintiffs, and have significant implications for interstate commerce and national policy." S. Rep. No. 109-14, at 27 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 27. *See also* S. Rep. No. 109-14, at 35, *as reprinted in* 2005 U.S.C.C.A.N. at 34 (the intent of CAFA "is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications").

In addition to CAFA's legislative history, the structure of the statute and the text of its other provisions clearly demonstrate that the purpose of CAFA was to create a new set of jurisdictional rules for class actions and mass actions that would provide for federal jurisdiction over large-scale interstate ac-

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the intentions of the bill's drafters and because of its proximity to the House vote. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) ("Although the statements of one legislator made during debate may not be controlling . . . Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction.") (internal citation omitted); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 515 U.S. 687, 727 (1995) (Scalia, J., dissenting) ("evidence of what those who brought the legislation to the floor thought it meant [is] evidence as solid as any ever to be found in legislative history"); *Rogers v. Frito-Lay, Inc.*, 611 F.2d 1074, 1080 (5th Cir. 1980) ("In trying to learn Congressional intent by examining the legislative history of a statute, we look to the purpose the original enactment served . . . and the remarks in debate preceding passage.").

tions and ensure that defendants facing such large-scale interstate suits could remove them to federal court. *See* Sarah S. Vance, *A Primer On The Class Action Fairness Act Of 2005*, 80 Tul. L. Rev. 1617, 1630 ("CAFA's broadened diversity jurisdiction over class actions commensurately expands defendants' opportunities to remove class actions."); *id.* at 1639-40 ("CAFA was no doubt intended to liberalize removal for cases within its scope by eliminating some of the statutory limitations on removal").

For example, the statute's text eliminates several long-standing hurdles to removing interstate class actions and mass actions to federal court – such as the previous requirement that each class member separately meet the $75,000 amount in controversy requirement. *See Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973). Under CAFA, the claims of putative class members are aggregated to determine if the new $5,000,000 amount is satisfied. 28 U.S.C. § 1332 (d)(6). CAFA's requirement that there be only minimal diversity between any member of the putative class and any defendant – a departure from the previous rule that required complete diversity – also eases an important restriction on removing class actions and mass actions to federal court.

As already noted, CAFA also established an entirely new removal provision – 28 U.S.C. § 1453 – applicable only to the removal of diversity class actions and mass actions. Pursuant to section 1453, class actions may be removed without the consent of any co-defendant, may be removed without regard to the one-year time limit in 28 U.S.C. § 1446(b), and

may be removed without regard to whether any defendant is a citizen of the State in which the suit was originally filed. Taken together, these new provisions "substantially expand federal jurisdiction over class actions" and "drastically liberalize[] rules for removal of class actions." H. Hunter Twiford, III, et al., *CAFA's New "Minimal Diversity" Standard For Interstate Class Actions*, 25 Miss. C. L. Rev. 7, 7-8 (2005); *see also id.* at 60 ("These fundamental changes greatly liberalize and invite, rather than discourage, federal court jurisdiction over class actions within the scope of CAFA.").

Indeed, courts and commentators have recognized that "CAFA represents the largest expansion of federal jurisdiction in recent memory." Vance, *supra*, at 1643. Through CAFA, Congress "expressly reflect[ed] a goal of changing the jurisdictional status quo for class actions" by extending "federal jurisdiction over interstate class actions which, prior to CAFA's enactment, could not be maintained in or removed to federal court under the existing" regime. Twiford, *supra*, at 9. Put simply, the "language and structure of CAFA itself indicates that Congress contemplated broad federal court jurisdiction." *See Evans v. Walter Indus.*, 449 F.3d 1159, 1163-64 (11th Cir. 2006).

Despite this overwhelming evidence that CAFA was intended to liberalize removal requirements for class actions and mass actions, reduce the hurdles defendants face in removing such cases to federal court, and prevent manipulative pleadings intended to evade jurisdiction, the Ninth Circuit's decision

promotes the opposite result and would make it more difficult for defendants to remove mass action cases.

In sum, although both § 1441 and § 1453 grant parties the right to remove state cases to federal court, they are different statutes, enacted at different times and for different purposes. Congress did not need to create § 1453 – it could have simply amended 28 U.S.C. § 1332 and then allowed the traditional removal statute to govern CAFA removals. Instead, Congress enacted an entirely new removal statute, evidencing a clear desire to expand access to federal court for qualifying cases and to have CAFA removals treated differently from other removals. The Ninth Circuit's cramped reading of CAFA is contrary to this intent and reflects an improper presumption against removal that "defeat[s] Congress's clear intent in crafting this special-purpose statute." Twiford, *supra*, at 10.

II. THE NINTH CIRCUIT'S RULING UNDERMINES CAFA'S PURPOSES BY INVITING GAMESMANSHIP.

The Ninth Circuit's ruling also defies Congressional intent by establishing strong incentives for gamesmanship by plaintiffs' attorneys. One of the primary goals of CAFA was to close loopholes in the federal diversity jurisdiction statute and thereby end the jurisdictional gamesmanship employed by plaintiffs' attorneys who sought to litigate class actions in "magnet courts." S. Rep. No. 109-14, at 10-11. But the decision below creates a new loophole, providing plaintiffs' attorneys with a simple tool for evading

CAFA's reach over mass actions – simply carve up any collective action lawsuit into multiple, identical, 99-plaintiff lawsuits.

There can be no question that one key goal of CAFA was to eliminate jurisdictional loopholes. As one of the bill's key sponsors, then-House Judiciary Committee chairman F. James Sensenbrenner, stated on the House floor, CAFA was not intended "to create loopholes." 151 Cong. Rec. H723, 730 (daily ed. Feb. 17, 2005). Likewise, the Senate Committee Report observes that Congress was prompted to reform class actions because "current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts." S. Rep. No. 109-14, at 4; *see also id.* at 10 ("[C]urrent law enables plaintiffs' lawyers who prefer to litigate in state courts to easily 'game the system' and avoid removal of large interstate class actions to federal court."). The Committee Report documented the extent to which "plaintiffs' counsel frequently and purposely evade federal jurisdiction by" using pleading tactics such as adding parties "simply based on their state of citizenship" to avoid federal jurisdiction. *Id.* at 10. After an extensive review of the abuses that resulted from leaving national interstate class actions in state courts, the Committee reiterated that these problems arise because "plaintiffs' lawyers can easily manipulate their pleadings to ensure that their cases remain at the state level." *Id.* at 26. Congress thus enacted CAFA to "provid[e] for Federal court consideration of interstate cases of national importance." CAFA 2(b)(2); *see also* S. Rep. No. 109-14, at 27 (explaining that

the purpose of the statute was to "help minimize the class action abuses taking place in state courts and ensure that these cases can be litigated in a proper forum").

"These purposes support reading CAFA not to permit the splintering of lawsuits solely to avoid federal jurisdiction in the fashion done in this case." *Freeman*, 551 F.3d at 408.; *see also id.* at 407 ("CAFA was clearly designed to prevent plaintiffs from artificially structuring their suits to avoid federal jurisdiction.").

The decision below will once again empower plaintiffs' attorneys to "manipulate their pleadings" in order to "game the system" and close the federal courthouse doors to mass actions under CAFA. The gamesmanship in the present case is laid bare by the fact that plaintiffs filed all seven of the lawsuits at issue in the same state court – presumably intending that the state court would ultimately treat the suits as one collective "mass action." Under the Ninth Circuit's ruling, that will be the norm: attorneys will be able to defy Congress's directive that federal courts are the proper forum for "interstate cases of national importance" by simply carving up mass actions into multiple, identical, 99-plaintiff suits. The Court should grant certiorari to avoid that result.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, the petition for a writ of certiorari should be granted.

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